

INDEX

	Page
Complaint	1
Answer	8
Initial Decision	13
Order Providing for the Filing of Objections to Proposed Order and Reply	75
Findings as to the Facts, Conclusions and Proposed Order	76
Opinion of the Commission	98
Proceedings	129
Witnesses:	
Andrew J. Berry, Jr.	
Direct Examination	129
George B. Page	
Direct Examination	144
Cross Examination	155
Redirect Examination	161
Jack D. Anderson	
Direct Examination	162
W. L. Johnston	
Direct Examination	174
Paul W. Gehl	
Direct Examination	183
Cross Examination	187
John E. DeMaster	
Direct Examination	188
Cross Examination	193

II I N D E X (Continued)

	Page
William Diehl	
Direct Examination	193
Cross Examination	199
Redirect Examination	200
Wilbur Hartley	
Direct Examination	202
Cross Examination	209
Redirect Examination	217
Recross Examination	219
Charles D. Blackman	
Direct Examination	220
Cross Examination	226
Woodrow W. Power	
Direct Examination	233
Cross Examination	243
Redirect Examination	247
Daniel Shumpert	
Direct Examination	248
Cross Examination	257
Hampton Sox Caughman	
Direct Examination	262
Cross Examination	274
Neal P. Ponder	
Direct Examination	277
Cross Examination	285
Redirect Examination	289
Recross Examination	291

III I N D E X (Continued)

	Page
Herbert Byrne Drake, Jr.	
Direct Examination	292
Cross Examination	298
Clyde A. Wrenn	
Direct Examination	301
Cross Examination	312
Harold A. McFeely	
Direct Examination	318
Cross Examination	325
Redirect Examination	333
John C. Cromer	
Direct Examination	335
Cross Examination	344
Redirect Examination	347
Recross Examination	348
A. T. Charles	
Direct Examination	350
Henry Grady Coleman	
Direct Examination	361
Cross Examination	367
Clyde E. Todd	
Direct Examination	369
Robert Hillery Petrie	
Direct Examination	383
Cross Examination	390
Redirect Examination	395
Andrew J. Berry, Jr.	
Direct Examination	396

IV INDEX (Continued)

	Page
Melbourne C. Steele	
Cross Examination	408
Thomas Howard Timberlake	
Direct Examination	423
Cross Examination	439
Redirect Examination	468
Recross Examination	473
James Ralph Blackwell	
Direct Examination	476
Cross Examination	483
Andrew J. Berry, Jr. (Recalled)	
Direct Examination	487
Cross Examination	551
Redirect Examination	569
Edward M. Darcey	
Direct Examination	569
Oliver Doyle Hall	
Direct Examination	573
Cross Examination	585
Redirect Examination	589
George G. Leary	
Direct Examination	591
Cross Examination	593
Redirect Examination	595
William Talmadge Crowe	
Direct Examination	596
Cross Examination	600

V I N D E X (Continued)

	Page
Edward M. Darcey	
Direct Examination (Continued)	601
Cross Examination	611
Redirect Examination	632
Recross Examination	644
Herbert F. Taggart	
Direct Examination	646
Edward M. Darcey	
Direct Examination	673
Raymond Powers	
Direct Examination	674
Melbourne C. Steele	
Direct Examination (Resumed)	677
Cross Examination	680
Redirect Examination	703
Recross Examination	711
Further Redirect Examination	715
Edward M. Darcey	
Direct Examination	716
Herbert F. Taggart	
Direct Examination	717
Cross Examination	735
Commission's Exhibit No. 30-A	741
Commission's Exhibit No. 30-B	743
Commission's Exhibit No. 1085	745
Commission's Exhibit No. 1247	746
Commission's Exhibit No. 1443	747

VI
I N D E X (Continued)

	Page
Commission's Exhibit No. 1450	748
Commission's Exhibit No. 1632	749
Commission's Exhibit No. 1633	750
Commission's Exhibit No. 1918	751
Commission's Exhibit No. 2172	752
Commission's Exhibit No. 2173-A	753
Commission's Exhibit No. 2173-B	754
Commission's Exhibit No. 2174	755
Commission's Exhibit No. 2175	756
Commission's Exhibit No. 2176	757
Commission's Exhibit No. 2177	758
Commission's Exhibit No. 2178	759
Commission's Exhibit No. 2179	760
Commission's Exhibit No. 2180	761
Commission's Exhibit No. 2181	762
Commission's Exhibit No. 2182	763
Commission's Exhibit No. 2183	764
Commission's Exhibit No. 2184	765
Commission's Exhibit No. 2185	766
Commission's Exhibit No. 2186	767
Commission's Exhibit No. 2187	768
Commission's Exhibit No. 2188	769

VII I N D E X (Continued)

	Page
Commission's Exhibit No. 2189	770
Commission's Exhibit No. 2190	771
Commission's Exhibit No. 2191	772
Commission's Exhibit No. 2192	773
Commission's Exhibit No. 2194	774
Commission's Exhibit No. 2195	775
Commission's Exhibit No. 2196	776
Commission's Exhibit No. 2197	777
Commission's Exhibit No. 2198	778
Commission's Exhibit No. 2199	779
Commission's Exhibit No. 2200	780
Commission's Exhibit No. 2201-A	782
Commission's Exhibit No. 2201-B	784
Commission's Exhibit No. 2202-A	786
Commission's Exhibit No. 2202-B	787
Commission's Exhibit No. 2202-C	788
Commission's Exhibit No. 2230	789
Commission's Exhibit No. 2231	790
Commission's Exhibit No. 2232	791
Commission's Exhibit No. 2234	792
Commission's Exhibit No. 2235	793
Commission's Exhibit No. 2237-A	794

VIII I N D E X (Continued)

	Page
Commission's Exhibit No. 2238	795
Commission's Exhibit No. 2239	796
Commission's Exhibit No. 2861	797
Commission's Exhibit No. 2862	798
Commission's Exhibit No. 4700	799
Commission's Exhibit No. 4962	800
Commission's Exhibit No. 5002	801
Commission's Exhibit No. 5003	802
Commission's Exhibit No. 5006	803
Commission's Exhibit No. 5007	804
Commission's Exhibit No. 5100-A	805
Commission's Exhibit No. 5100-B	806
Commission's Exhibit No. 5164	807
Commission's Exhibit No. 5296	809
Commission's Exhibit No. 5309	823
Commission's Exhibit No. 5311	825
Commission's Exhibit No. 5315	826
Commission's Exhibit No. 5317	828
Commission's Exhibit No. 5318-A	829
Commission's Exhibit No. 5318-B	830
Commission's Exhibit No. 5320	831
Commission's Exhibit No. 5321-A	833

IX
I N D E X (Continued)

	Page
Commission's Exhibit No. 5321-B	834
Commission's Exhibit No. 5321-C	835
Commission's Exhibit No. 5322	837
Commission's Exhibit No. 5325-B	838
Commission's Exhibit No. 5327-B	840
Commission's Exhibit No. 5329-A	843
Commission's Exhibit No. 5331	845
Commission's Exhibit No. 5332	846
Commission's Exhibit No. 5359	848
Commission's Exhibit No. 5372-A	850
Commission's <u>Exhibit</u> No. 5372-B	852
Commission's Exhibit No. 5404	852
Commission's Exhibit No. 5456	854
Commission's Exhibit No. 5479-A	857
Commission's Exhibit No. 5479-B	858
Commission's Exhibit No. 5479-C	859
Commission's Exhibit No. 5479-D	860
Commission's Exhibit No. 5479-E	861
Commission's Exhibit No. 5479-F	862
Commission's Exhibit No. 5479-G	863
Commission's Exhibit No. 5479-H	864
Commission's Exhibit No. 5479-I	865

X I N D E X (Continued)

	Page
Commission's Exhibit No. 5479-J	866
Commission's Exhibit No. 5479-K	867
Commission's Exhibit No. 5479-L	868
Commission's Exhibit No. 5479-M	869
Commission's Exhibit No. 5479-N	870
Commission's Exhibit No. 5479-O	871
Respondent's Exhibit No. 7	872
Respondent's Exhibit No. 9	873
Respondent's Exhibit No. 10	874
Respondent's Exhibit No. 11	875
Respondent's Exhibit No. 12	876
Respondent's Exhibit No. 13	877
Respondent's Exhibit No. 14	878
Respondent's Exhibit No. 15	879
Respondent's Exhibit No. 16-1	880
Respondent's Exhibit No. 16-2	881
Respondent's Exhibit No. 16-3	882
Respondent's Exhibit No. 16-4	883
Respondent's Exhibit No. 16-5	884
Respondent's Exhibit No. 17	885
Respondent's Exhibit No. 76-A	886
Respondent's Exhibit No. 76-B	887

XI
I N D E X (Continued)

	Page
Respondent's Exhibit No. 76-1	888
Respondent's Exhibit No. 76-2	889
Respondent's Exhibit No. 76-3	890
Respondent's Exhibit No. 76-4	891
Respondent's Exhibit No. 76-5	892
Respondent's Exhibit No. 76-6	893
Respondent's Exhibit No. 76-7	894
Respondent's Exhibit No. 76-8	895
Respondent's Exhibit No. 76-9	896
Respondent's Exhibit No. 76-10	897
Respondent's Exhibit No. 76-11	898
Respondent's Exhibit No. 76-12	899
Respondent's Exhibit No. 76-13	900
Respondent's Exhibit No. 76-14	901
Respondent's Exhibit No. 76-15	902
Respondent's Exhibit No. 76-16	903
Respondent's Exhibit No. 76-17	905
Respondent's Exhibit No. 76-18	905
Respondent's Exhibit No. 76-19	906
Respondent's Exhibit No. 76-20	907
Respondent's Exhibit No. 76-21	908
Respondent's Exhibit No. 76-22	909

XII
I N D E X (Continued)

	Page
Respondent's Exhibit No. 76-23	910
Respondent's Exhibit No. 76-24	911
Respondent's Exhibit No. 76-25	912
Respondent's Exhibit No. 76-26	913
Respondent's Exhibit No. 76-27	914
Respondent's Exhibit No. 76-28	915
Respondent's Exhibit No. 76-29	916
Respondent's Exhibit No. 76-30	917
Respondent's Exhibit No. 76-31	918
Respondent's Exhibit No. 76-32	919
Respondent's Exhibit No. 76-33	920
Respondent's Exhibit No. 76-34	921
Respondent's Exhibit No. 76-35	922
Respondent's Exhibit No. 76-36	923
Respondent's Exhibit No. 76-37	924
Respondent's Exhibit No. 76-38	925
Respondent's Exhibit No. 76-39	926
Respondent's Exhibit No. 76-40	927
Respondent's Exhibit No. 76-41	928
Respondent's Exhibit No. 76-42	929
Respondent's Exhibit No. 77-A	930
Respondent's Exhibit No. 77-B	931

XIII
I N D E X (Continued)

	Page
Respondent's Exhibit No. 79-A	932
Respondent's Exhibit No. 79-B	933
Respondent's Exhibit No. 79-C	934
Respondent's Exhibit No. 79-D	935
Respondent's Exhibit No. 79-E	936
Respondent's Exhibit No. 79-F	937
Respondent's Exhibit No. 79-G	938
Respondent's Exhibit No. 79-H	939
Respondent's Exhibit No. 79-I	940
Respondent's Exhibit No. 80	941
Respondent's Exhibit No. 81	942
Respondent's Exhibit No. 87	943
Respondent's Exhibit No. 88	944
Respondent's Exhibit No. 89	945
Respondent's Exhibit No. 102-A	946
Respondent's Exhibit No. 105-A	947
Respondent's Exhibit No. 106-A	948
Respondent's Exhibit No. 107-A	949
Respondent's Exhibit No. 114	950
Respondent's Exhibit No. 115	951

XIV

I N D E X (Continued)

	Page
Proceedings in the United States Court of Appeals for the Fifth Circuit	975
Minute entry of argument and submission (omitted in printing)	975
Opinion, Hutcheson, J.	975
Judgment	986
Clerk's certificate (omitted in printing)	986
Order extending time to file petition for writ of certio- rari	987
Order allowing certiorari	988

COMPLAINT
UNITED STATES OF AMERICA
BEFORE
FEDERAL TRADE COMMISSION

DOCKET NO. 7129

IN THE MATTER OF:

BORDEN COMPANY, A Corporation.

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C.A., Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH ONE: Respondent, The Borden Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its offices and principal place of business located at 350 Madison Avenue, New York 17, New York.

PARAGRAPH TWO: The Borden Company is primarily an operating company engaged in a variety of enterprises. These enterprises include extensive manufacture, processing, distribution and sale of dairy products throughout the United States. The Borden Company is and has been, at all times referred to

herein, one of the largest concerns in the dairy products industry.

Included among the aforesaid operations of The Borden Company is the manufacture, distribution and sale of evaporated milk. At all times referred to herein The Borden Company sold substantial quantities of evaporated milk to concerns engaged in the purchasing, distributing, wholesaling or retailing of food products. In 1956 its sales of evaporated milk were in excess of \$30,000,000.

PARAGRAPH THREE: In the course and conduct of its said business, The Borden Company has sold and distributed its evaporated milk to purchasers thereof located in states other than the state of origin of said product, and has caused such product, when sold, to be shipped and transported from its place of business in the state of origin to purchasers located in other states. There is now, and has been, a constant current of trade in commerce, as "commerce" is defined in the Clayton Act, in said product by respondent between and among the various States of the United States and the District of Columbia.

Said product is, and has been, sold and distributed for use, consumption and resale in the various States of the United States and the District of Columbia.

PARAGRAPH FOUR: The Borden Company, in the course and conduct of its said business is now, and at all times referred to herein has been, in substantial competition with others engaged in the manufacture,

distribution and sale of evaporated milk in commerce between and among the various States of the United States and the District of Columbia.

Each and every one of The Borden Company's purchasers of evaporated milk are, and have been, in substantial competition with other of its purchasers of evaporated milk.

PARAGRAPH FIVE: During the period from January 1, 1956, to the present, The Borden Company, in the course and conduct of its business, has discriminated in price between different purchasers of its evaporated milk of like grade and quality by selling it to some of its purchasers at substantially lower prices than to other of its purchasers. An example of such discriminations in price is set out as follows:

Plants of The Borden Company engaged in the manufacture of canned evaporated milk are located at Albany, Oregon; Modesto, California; Ft. Scott, Kansas; Dixon, Illinois; New London, Wisconsin; Per-
rington, Michigan; Wellsboro, Pennsylvania; Lewis-
burg, Tennessee; and Chester, South Carolina. Each of the aforesaid plants manufactured and canned evaporated milk, some of which was offered and sold generally as a "Borden"-labeled product to purchasers engaged in the purchasing, distributing, wholesaling or retailing of food products, and some of which was offered and sold as a buyer-labeled product to selected purchasers engaged in the purchasing, distributing, wholesaling or retailing of food products.

The Borden Company's pricing system for evaporated milk includes two pricing methods. "Borden"-label evaporated milk is priced on a uniform, delivered, one price basis, which includes the cost of delivery from the plant of manufacture to the purchaser. Buyer-label evaporated milk is priced on an f.o.b. plant basis. From January 1, 1956, to the present, the prices of both "Borden"-label and buyer-label evaporated milk have varied from time to time. Throughout the aforesaid period, however, buyer-label prices have been consistently and substantially lower than "Borden"-label prices. The aforesaid price differential is illustrated by prices in effect in July 1957, which were as follows:

<i>Plant</i>	<i>Borden label (per case, tall 48's)</i>	<i>Borden label (per case, tall 48's)</i>	<i>Price Differ- ential</i>
Albany, Oregon	\$6.45	\$5.59	\$.86
Modesto, California	6.45	5.12	1.33
Ft. Scott, Kansas	6.45	6.45	1.19
Dixon, Illinois	6.45	5.25	1.20
New London, Wisconsin	6.45	5.32	1.13
Perrington, Michigan	6.45	5.42	1.03
Willsboro, Pennsylvania	6.45	5.37	1.08
Lewisburg, Tennessee	6.45	5.01	1.44
Chester, South Carolina	6.45	5.01	1.44

Only a small portion of the price differential hereinbefore referred to was attributable to cost of delivery of "Borden"-label evaporated milk from the plant of manufacture to the purchaser. From January 1, 1956, to the present, through the use of the sales method and pricing system hereinbefore described, The

Borden Company made sales of buyer-label evaporated milk to selected customers at prices substantially less than the prices to other customers of "Borden"-label evaporated milk.

PARAGRAPH SIX: The effect of respondent's aforesaid discriminations in price between different purchasers of such products sold and purchased in the manner and method as above described may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and the aforesaid favored purchasers are engaged or to injure, destroy or prevent competition with said respondent, said favored purchasers or with customers of either of them.

PARAGRAPH SEVEN: The foregoing alleged discriminations in price made by respondent The Borden Company are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this 22nd day of April, 1958, issues its complaint against said respondent.

NOTICE

Notice is hereby given to the respondent hereinbefore named that the 7th day of July, A.D., 1958, at 10 o'clock is hereby fixed as the time and Amboy, Illinois as the place when and where a hearing will be had before a hearing examiner of the Federal Trade

Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct

a hearing to determine the form of order, and thereafter, to enter an initial decision containing such findings and order.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 22nd day of April, 1958.

By the Commission.

(Signed) ROBERT M. PARRISH
Robert M. Parrish,
Secretary.

ANSWER

(Number and Title Omitted)

Received: June 23, 1958

Dated June 20, 1957.

CECIL I. CROUSE,
350 Madison Avenue,
New York 17, N. Y.
D E W E Y, BALLANTINE,
BUSHBY, PALMER &
WOOD,
40 Wall Street,
New York 5, N. Y.
Attorneys for The Borden
Company

The Borden Company (herein called Borden), for its Answer to the Complaint herein, respectfully says that:

1. Borden admits the allegations set forth in PARAGRAPH ONE of the Complaint.

2. Borden denies the allegations set forth in the first subparagraph of PARAGRAPH TWO of the Complaint, except that it admits that it is primarily an operating company engaged in a variety of enterprises; that it manufactures, processes, distributes and sells dairy products in various parts of the United States; and that it is and has been one of the larger concerns in the dairy products industry.

Borden admits, as modified by the foregoing subparagraph of this PARAGRAPH TWO, the allegations set forth in the second subparagraph of PARAGRAPH TWO of the Complaint.

3. Borden admits the allegations set forth in PARAGRAPH THREE of the Complaint, except that

(a) it denies that there is now or has been a constant current of trade in commerce, as "commerce" is defined in the Clayton Act, in evaporated milk by it between and among all the various states of the United States and the District of Columbia;

(b) it denies that its evaporated milk is or has been sold by it for use, consumption or resale in all the various states of the United States;

(c) it denies knowledge sufficient to form a belief as to whether its evaporated milk is now or has been sold by others for use, consumption, or resale in all the various states of the United States.

4. Borden denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in PARAGRAPH FOUR of the Complaint, except that it admits that it is now and has been in competition with others engaged in the manufacture, distribution and sale of evaporated milk in commerce

between and among various states of the United States and the District of Columbia.

5. Borden denies the allegations set forth in PARAGRAPH FIVE of the Complaint, except that it admits that

(a) at the locations named in PARAGRAPH FIVE of the Complaint (other than Perrinton, Michigan, which has been closed), Borden has plants engaged in the production of (i) Borden's own advertised brand of canned evaporated milk (herein called Borden brand evaporated milk), and (ii) other canned evaporated milk, bearing a variety of names, labels and other identifications as designated by purchasers thereof from time to time (and herein called buyer-labeled evaporated milk);

(b) the Borden brand evaporated milk and the buyer-labeled evaporated milk have been and are offered and sold to purchasers engaged in the purchasing, distributing, wholesaling and retailing of food products;

(c) the Borden brand evaporated milk is sold at a delivered price and the buyer-labeled evaporated milk is sold at an f.o.b. plant price;

(d) the delivered prices received by Borden for Borden brand evaporated milk and the f.o.b. plant

prices received by Borden for buyer-labeled evaporated milk have varied from time to time since January 1, 1956, and as compared with the said prices for Borden brand evaporated milk, the said prices for buyer-labeled evaporated milk have during said period been consistently lower (i) in order in good faith to meet the equally low prices of competitors, and (ii) by amounts which did not exceed differences in Borden's costs;

(e) the delivered list prices for Borden brand evaporated milk, in effect in July 1957 (which prices were subject to a discount of 2% for payment of cash within ten days), were as set forth in the table in PARAGRAPH FIVE of the Complaint;

(f) the f.o.b. plant prices for buyer-labeled evaporated milk, received by Borden in respect of sales in July 1957, were as set forth in the table in PARAGRAPH FIVE of the Complaint, at Albany, Oregon; Modesto, California; Fort Scott, Kansas; New London, Wisconsin; Wellsboro, Pennsylvania; Lewisburg, Tennessee and Chester, South Carolina (which prices included the cost of labels at all of the locations just named, except Chester, South Carolina, where the labels were furnished by the purchaser); and the differences between Borden's delivered list prices for Borden brand evaporated milk and Borden's f.o.b. plant prices for buyer-labeled evaporated milk, at the locations just named, in July 1957, were as set forth in the right-hand column of the table in PARAGRAPH FIVE of the Complaint.

6. Borden denies the allegations set forth in PARAGRAPH SIX of the Complaint.

7. Borden denies the allegations set forth in PARAGRAPH SEVEN of the Complaint.

WHEREFORE, Borden respectfully prays that the Complaint against it be dismissed.

Dated June 20, 1958.

CECIL I. CROUSE,
350 Madison Avenue,
New York 17, New York.

DEWEY, BALLANTINE,
BUSHBY, PALMER &
WOOD

(Signed) JOHN E. F. WOOD
A Member of the Firm,
40 Wall Street,
New York 5, New York.

Attorneys for The Borden
Company

INITIAL DECISION

(Number and Title Omitted)

Received: Dec. 15, 1961

By Abner E. Lipscomb, Hearing Examiner.

Raymond L. Hays, Theodor P. von Brand, and Richard B. Smith, for the Commission;

Dewey, Ballantine, Bushby, Palmer & Wood, by Kent V. Lukingbeal and John E. F. Wood, New York, N. Y., and Cecil I. Crouse, New York, N. Y., for the Respondent.

I. The Complaint

1. The complaint herein was issued on April 22, 1958, charging the Respondent with discrimination in price between different purchasers of its evaporated milk of like grade and quality during the period from January 1, 1956, to the date of the complaint, by selling such milk to some of its purchasers at substantially lower prices than to others of its purchasers, in violation of § 2(a) of the Clayton Act as amended by the Robinson-Patman Act. The portions of the Clayton Act upon which the complaint is based provide as follows:

"Sec. 2(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different

purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers or either of them; *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered;

* * *

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section,

* * * "

2. The complaint alleges that certain of Respondent's plants manufactured and canned evaporated milk, some of which was sold as a "Borden-labeled" product to purchasers engaged in the wholesaling or retailing of food products, and some of which was sold under the purchaser's label as a "buyer-labeled" product to certain other "selected" purchasers who were also engaged in the wholesale or retail distribution of food products. The amount of such sales in 1956 is alleged to exceed \$30,000,000.

3. The complaint alleges further that two different pricing systems were employed by the Respondent in the sale of such evaporated milk. On one hand, the Borden-labeled evaporated milk was sold throughout the United States at a uniform delivered price, which included the cost of the milk and the cost of transportation thereof from Respondent's plant to the purchaser. On the other hand, the buyer-labeled evaporated milk was sold on an f.o.b.-plant basis, which did not include the cost of transportation from the Respondent's plant to the purchaser. The complaint further alleges that from January 1, 1956, to April 22, 1958, the date of the complaint, the price of the buyer-labeled evaporated milk has been consistently and substantially lower than the price of the Borden-labeled evaporated milk, a difference varying during July, 1957, from 86c to \$1.44 per case. The complaint avers further that only a small portion of such price differential was attributable to the cost of delivering the Borden-labeled evaporated milk. The complaint concludes that the effect of such discrimination in price may be substantially to lessen competition or

tend to create a monopoly in the lines of commerce in which the Respondent and its purchasers are engaged, or to injure, destroy or prevent competition with Respondent, with Respondent's favored purchasers, or with customers of either of them.

II. *The Answer*

4. The Respondent, although denying in its answer various particular allegations of the complaint, admits that it is one of the larger corporations in the United States engaged in the dairy industry; that it sells and distributes its products in interstate commerce; and that it maintains a different pricing system for its Borden Brand Milk, as distinguished from its buyer-labeled evaporated milk.

5. Respondent particularly declares that its prices have been consistently low to meet equally low prices of competitors, and that the prices of its two lines of evaporated milk did not differ more than the difference in cost thereof. In conclusion, Respondent denies that its pricing practices in the sale of evaporated milk have resulted in any injury to competition, or that such practices are in violation of the provisions of §2(a) of the Clayton Act, as amended.

III. *Hearings and Proposed Findings*

6. Hearings for the reception of evidence in support of the case-in-chief, in defense, in rebuttal, and in surrebuttal were held intermittently from September 22, 1958, to and including July 11, 1961. Consideration

has been given to the entire record herein, including proposed findings as to the facts, proposed conclusions, and written arguments in support thereof. Each of those proposals which has been accepted has been, in substance, incorporated into this initial decision. All proposals not so incorporated are hereby rejected.

IV. *The Issues*

7. The controlling issues herein, arising from the pleadings, the evidence and the relevant provisions of the Clayton Act, are as follows:

a. During the period of time contemplated in the complaint, was the evaporated milk sold by Respondent under its own label, and that sold by it under the labels of purchasers, of "like grade and quality"?

b. If Respondent did in fact sell evaporated milk of "like grade and quality" under both its own label and the labels of its purchasers, did Respondent discriminate in price between the purchasers of Borden-labeled milk and purchasers of private-labeled milk?

c. If Respondent did so discriminate in price between purchasers of its evaporated milk "of like grade and quality", is there a reasonable probability that the result of " * * * such discrimination may be substantially to lessen competi-

tion, or tend to create a monopoly in any line of commerce”?

d. If the record shows, *prima facie*, that the Respondent has discriminated in price in its sales of evaporated milk of like grade and quality, and by such discrimination has tended to injure competition or create a monopoly, has Respondent successfully sustained its “ * * burden of rebutting the *prima facie* case thus made” by justifying its price discrimination by proving that such difference in price was consequent to “only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such [evaporated milk] was to such purchasers sold or delivered”?

V. Identity of the Respondent

8. The Respondent, The Borden Company, is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and place of business located at 350 Madison Avenue, New York 17, N. Y.

VI. Respondent's Business in General, And Its Evaporated Milk Business in Particular

9. The Respondent is engaged in the manufacture, processing, distribution and sale of an extensive variety of food, dairy and chemical products in the United States and abroad. Its total sales in 1957 amounted to \$931,220,662.00. The only product with which we are

here concerned is evaporated milk. Substantial quantities of this product have been shipped from Respondent's various plants to purchasers thereof located in states other than the states of manufacture. In 1956 Respondent's sales of evaporated milk exceeded \$30,000,000.00.

10. Evaporated milk has been produced by the Respondent by evaporating whole milk to approximately one-half its original volume; adding Vitamin D and certain minerals as a stabilizing agent to prevent curdling; putting such mixture in cans, and sterilizing it. This product has most frequently been packed by the Respondent in 14-1/2 ounce cans, 48 cans to a case. These cases are called "tall 48s". Respondent also packs evaporated milk in 6-ounce cans, 96 cans to the case, referred to as "small 96s". When these 6-ounce cans are packed 48 to a case, it is referred to as "small 48s". Other sizes of canned evaporated milk are also produced for the confectionery industry.

VII. Respondent's "Borden Brand" Prices and Sales

11. Respondent has been producing Borden Brand evaporated milk since 1892, and selling it, in competition with Pet and Carnation, the other two large producers of evaporated milk in this country, on a delivered-price basis, with the same prices prevailing throughout the United States. The Respondent, like its two chief competitors, has continued selling its Borden Brand evaporated milk in the same manner, without change, throughout the period of time included in the complaint. The Respondent's carload and pool-car

delivered prices for Borden Brand evaporated milk during this time were as follows:

January 1, 1956, to May 14, 1956	\$6.05 per case,	
	tall 48s;	
May 15, 1956, to March 29, 1957	6.30	Ditto;
March 30, 1957, to November 18, 1957	6.45	Ditto;
November 19, 1957, to March 31, 1958 ...	6.60	Ditto.

12. The less-than-carload prices throughout this period of time were 5c higher per case of tall 48s. The terms of sale have included a cash discount of 2% if paid within 10 days after sale, and a swell allowance of 1/10 of 1% to cover damaged goods sold to retail buyers. Such sales of Borden Brand evaporated milk were made principally to wholesalers or jobbers, and to chain stores.

VIII. Respondent's Private-Brand Prices and Sales

13. In about 1938, the Respondent began packing its evaporated milk under the private labels of the purchasers as well as under its own Borden Brand. During the period of time with which we are concerned, January 1, 1956, to March 31, 1958, the prices of such milk were determined by a pricing formula applicable to all of Respondent's private-label customers. This formula included the cost of the buyer's label, the cost of hauling the milk from the dairy farm to Respondent's plant, the average monthly cost of the milk, and,

finally, a factor referred to as "COTM", or "Cost Other Than Milk", which included the cost of additives such as Vitamin D, the cost of cans, the plant processing, overhead cost, and a gross margin or profit factor. The Respondent's private-label prices determined in accordance with the foregoing formula, sometimes referred to as the "Cost plus pricing formula", were net f.o.b. plant. No cash or other discount was allowed the purchaser of private-label milk, and all purchasers buying from the same plant at or about the same time paid the same price. These prices, however, varied from one to another of Respondent's plants, and from month to month in conformance with the changing price of milk paid to the farmers. A further factor of variation was Respondent's periodic revision of its gross margin of profit, which was reviewed approximately every six months, and adjusted to the changing conditions of Respondent's general operation.

IX. Commodities of Like Grade and Quality

14. Counsel supporting the complaint contends that all of Respondent's evaporated milk, whether sold under private labels or under the Borden label, is of like grade and quality. The Respondent insists, however, that because the uncontroverted evidence shows that Borden Brand evaporated milk commanded a substantially higher market price than its private-label evaporated milk, such variously-labeled milk is not of "like grade and quality".

15. The evidence shows that there was no difference in the physical composition or quality of the evap-

orated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously-labeled cans at different prices.

16. Of necessity, all of Respondent's milk retained the same physical composition when it was labeled and sold, as when it was canned, and no magic of the market-place thereafter changed that simple fact. Fidelity to the record, in our opinion, compels the conclusion that Respondent's evaporated milk, regardless of how it was labeled or at what price it may have been sold, either at Respondent's plant or in the market-place, was milk of "like grade and quality" within the meaning of 2(a) of the Clayton Act as amended. This conclusion accords, we think, with the Commission's past interpretation of the phrase "like grade and quality". See: *Goodyear Tire & Rubber Company*, 22 FTC 232 (1936), reversed on other grounds, 101 F.2d 120 (1939).

X. *Survey of Consumer Selection of Evaporated Milk Brands*

17. There was received in evidence as Respondent's Exhibit 89 the results of a house-to-house survey

conducted for the Respondent by National Analysts, Inc., entitled "Study of Consumer Selection of Evaporated Milk Brands". The survey was conducted in those geographical areas where the bulk of Borden Brand evaporated milk had been sold during the previous years. The purpose of the survey, as stated in the report thereof, was to determine (1) the proportion of consumers using evaporated milk who would buy Borden Brand evaporated milk in preference to an unknown private-label brand, even though the private-label brand sold for from 1c to 5c per can less than the Borden Brand; and (2) to ascertain each consumer's reasons for buying the particular brand purchased.

18. Of the 3,952 housewives interviewed, 2,200 were deemed eligible for the survey in the sense of having purchased evaporated milk within the past two months. Of the 2,220 interviewed, 1,951, or 87.9%, were represented to have purchased from the interviewer either a can of Borden Brand evaporated milk, or a can of an unknown private-label brand. Of the 1,951 housewives who purchased milk from the interviewer, 1,403, or 72%, purchased Borden Brand, and 548, or 28%, purchased a private-label brand. Prior to the purchase, however, each housewife was presented with a set of kitchen cutlery as compensation for her cooperation in granting the interview. She was then asked to select and purchase her preference of the Borden Brand milk and the unknown private-label brand milk, which latter brand was priced from 1c to 5c less per can than the Borden Brand. After the purchase was

completed, the interviewer returned the purchase money to the housewife, and the milk became a gift.

19. Each housewife was then asked the reason for her selection. Typical of the answers received were:

"[Borden Brand] seems to be a lot creamier than other evaporated milks."

"[Borden Brand] doesn't have a can taste."

"I have never had any [Borden Brand] sour like I have other kinds."

"Well, we've used other brands and we like Borden's the best. We like the flavor better."

"[Borden Brand] is a heavier milk and you could tell in your coffee when the milk is cheaper because it's too thin. * * [Borden Brand] has a good thick texture."

"[Borden Brand] is more flavorsome than some other brands — that have an unpleasant taste."

"* * * I like Borden's because I feel they are more sanitary in the handling and preparing of their milk."

"I don't think [Borden Brand] has that thickness that some canned milks have — that canny taste."

"The cheaper ones are watery. Borden's is the best evaporated milk to whip that I know of."

"My mother used to use Borden's and she liked it."

"I like Borden's powder milk better than any kind of powdered milk so I am sure the evaporated would be good."

"I've heard the name Borden's a long time * * *".

"* * * [Borden Brand] has been on the market for forty years so it must be good."

20. To the extent that the reasons given by the housewives for their preference involve a comparison, expressed or implied, of Borden Brand with an unknown brand, we regard their reasons as worthless. A valid comparison cannot, of course, be made between the known and the unknown. Furthermore, the survey does not prove, nor tend to prove, that Borden Brand and Borden's private-label brands are of a different grade or quality of evaporated milk.

21. The survey does tend to prove, however, that Borden Brand evaporated milk is a well-known and widely-distributed product, which is preferred to unknown brands by a substantial number of housewives, even though the Borden Brand costs 1c to 5c per can more. This conclusion is supported in substance by the testimony of the retail merchants in North Carolina who testified in this proceeding.

*XI. Differences in Price Between Borden Brand
and Private-Label Brand Evaporated Milk*

22. Numerous invoices in the record show that during the period of time included in the complaint, the f.o.b. price of Respondent's private-label evaporated milk at its various plants was consistently and substantially lower than the delivered price of Respondent's Borden Brand evaporated milk. The transactions evidenced by these invoices occurred at one or another of Respondent's nine plants, located, respectively, at Fort Scott, Kansas; Wellsboro, Pennsylvania; Modesto, California; Albany, Oregon; Dixon, Illinois; New London, Wisconsin; Perrinton, Michigan; Lewisburg, Tennessee; and Chester, South Carolina. The prices of Borden Brand and private-label brand evaporated milk prevailing at three of Respondent's plants during the time involved illustrate the differences in price, as follows:

Chester, South Carolina, Plant

<i>1957</i>	<i>Delivered price, Borden Brand milk</i>	<i>F.o.b. price, private-label milk</i>
June	\$ 6.45 per case	\$ 4.8942 per case
July	6.45 per case	4.9051 per case
August	6.45 per case	4.9210 per case
September	6.45 per case	4.8660 per case
October	6.45 per case	4.8166 per case
November	6.45 per case	4.9361 per case
December	6.60 per case	4.9741 per case

1958

January	\$ 6.60 per case	\$ 5.0227 per case
February	6.60 per case	5.0289 per case
March	6.60 per case	4.9436 per case

Lewisburg, Tennessee, Plant

1956

August	\$ 6.30 per case	\$ 4.7363 per case
September	6.30 per case	4.81988 per case
September	6.30 per case	4.8321 per case
October	6.30 per case	4.7718 per case
October	6.30 per case	4.8418 per case
November	6.30 per case	4.7411 per case
November	6.30 per case	4.8211 per case
November	6.30 per case	4.8311 per case

1957

January	\$ 6.30 per case	\$ 4.9837 per case
January	6.30 per case	5.0737 per case
February	6.30 per case	5.0478 per case
February	6.30 per case	4.9628 per case
February	6.30 per case	5.0578 per case
March	6.30 per case	4.9766 per case
March	6.30 per case	4.8966 per case
March	6.30 per case	4.9666 per case
March	6.30 per case	4.9866 per case
March	6.30 per case	5.0566 per case
April	6.45 per case	4.8742 per case
April	6.45 per case	4.9542 per case
May	6.45 per case	4.8389 per case
May	6.45 per case	4.9189 per case
June	6.45 per case	4.8749 per case
July	6.45 per case	4.9232 per case

July	6.45 per case	4.8332 per case
August	6.45 per case	4.8327 per case
September	6.45 per case	4.8744 per case
October	6.45 per case	4.9738 per case
November	6.45 per case	4.966 per case
December	6.60 per case	4.999 per case

1958

January	\$ 6.60 per case	\$ 5.0273 per case
February	6.60 per case	5.0072 per case
March	6.60 per case	4.9436 per case
March	6.60 per case	4.9188 per case

Fort Scott, Kansas, Plant

1956

July	\$ 6.30 per case	\$ 5.0625 per case
August	6.30 per case	5.0606 per case
September	6.30 per case	4.9749 per case
September	6.30 per case	5.0241 per case
September	6.30 per case	5.05866 per case
October	6.30 per case	5.0037 per case
October	6.30 per case	5.0567 per case
October	6.30 per case	5.0877 per case
November	6.30 per case	5.1146 per case
November	6.30 per case	5.1716 per case
November	6.30 per case	5.1986 per case
December	6.30 per case	5.1258 per case
December	6.30 per case	5.1828 per case
December	6.30 per case	5.2098 per case

1957

January	\$ 6.30 per case	\$ 5.2431 per case
January	6.30 per case	5.3001 per case
January	6.30 per case	5.2759 per case
January	6.30 per case	5.3271 per case
March	6.30 per case	5.0874 per case
March	6.30 per case	5.1444 per case
March	6.30 per case	5.2244 per case
March	6.30 per case	5.1714 per case
March	6.30 per case	5.2514 per case
April	6.45 per case	5.1512 per case
April	6.45 per case	5.2082 per case
April	6.45 per case	5.2352 per case
May	6.45 per case	5.1295 per case
May	6.45 per case	5.1865 per case
May	6.45 per case	5.2135 per case
June	6.45 per case	5.1256 per case
June	6.45 per case	5.1966 per case
July	6.45 per case	5.1822 per case
July	6.45 per case	5.1832 per case
July	6.45 per case	5.1122 per case
August	6.45 per case	5.2077 per case
August	6.45 per case	5.2757 per case
September	6.45 per case	5.2229 per case
September	6.45 per case	5.2959 per case
October	6.45 per case	5.2737 per case
October	6.45 per case	5.3455 per case
October	6.45 per case	5.2725 per case
November	6.45 per case	5.3245 per case
November	6.45 per case	5.3995 per case
November	6:45 per case	4.966 per case

1958

February	\$ 6.60 per case	\$ 5.2509 per case
February	6.60 per case	5.3249 per case

23. Respondent contends that the differences in price cited above are not comparable because they do not include such factors as the delivery cost of the Borden Brand milk, as well as many other factors which they contend are included in the price of that brand, and which are not included in the price of Borden's private-label evaporated milk. Counsel supporting the complaint contend, however, that it is not necessary to adjust the price of the private-label milk and the Borden-label delivered price, in order to make them comparable for the purpose of showing a price differential under the Clayton Act. Counsel quoted from the opinion of the Supreme Court in *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U. S. 536 (1960), as follows:

" * * * it is only by equating price discrimination with price differentiation that Section 2(a) can be administered as Congress intended. As we read that provision, it proscribes price differences, subject to certain defined defenses, where the effect of the differences 'may be substantially to lessen competition . . . ' . . . In other words, the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the non-directive phrase 'discriminate in price'

* * *)

24. Although counsel admits that the Supreme Court was not therein adjudicating the same problem of determining whether prices had to be adjusted to make them comparable prior to determining price differential or discrimination within the meaning of the Clayton Act, they nevertheless contend that the above language clearly indicates that price discrimination means mathematical difference between the two prices, without considering those factors which may be offered in a cost-justification defense by Respondent. We believe that counsel supporting the complaint are correct in their contention; and, accordingly, we find that the differences in price, as herein shown, are *prima facie* price discrimination within the intent and meaning of the Clayton Act.

25. It remains to be determined, however, whether such price differences resulted in a substantial lessening of competition, thus violating the law, or whether such differences in price between Respondent's Borden Brand evaporated milk and Respondent's private-label evaporated milk have been justified by Respondent, as due allowances for differences in the cost of manufacture, sale or delivery of such milk.

XII. *Business Lost and Gained by Respondent*

26. As previously stated, Respondent has been selling private-labeled evaporated milk since about 1938, using its f.o.b.-plant pricing formula. In the eighteen months preceding the period of time covered by the complaint, Respondent lost the business of Safeway in the Northwestern and Rocky Mountain states, in the

amount of approximately 200,000 cases a year. According to Respondent's representative, this business was acquired by Pet and Carnation, who, because they had plants in that area while Respondent did not, were able to offer Safeway a better price.

27. In the first few months of 1956, the Respondent also lost additional business, amounting to 33,000 to 35,000 cases of evaporated milk, to Pet in the El Paso, Texas, area, which that representative of Respondent again attributed to a lower price resulting from the more convenient location of Pet's plants in that area. During the remainder of the period covered by the complaint, Respondent lost additional private-label business in the amount of about 20,000 cases, based upon its sales for the preceding twelve months, to unknown competitors in the Midwest area.

28. About July of 1955, Producers Creamery of Springfield, Missouri, discontinued the sale of private-label evaporated milk. Three of its customers, namely, Topco Associates, Central Retailer-Owned Grocers, and Hill Stores Company (hereinafter referred to as Topco, CROG and Hillco) asked the Respondent to supply them with private-label milk. In the negotiations which followed, Respondent agreed not only to supply these "orphaned" customers of Producers Creamery with evaporated milk for their Southwest area, but to supply CROG and Topco in a number of other areas. Respondent also agreed to supply Hillco from Respondent's plant in Birmingham, Alabama.

29. Thereafter, Respondent commenced the packing of evaporated milk at four additional plants, at which it had formerly packed only Borden Brand milk: Dixon, Illinois; New London, Wisconsin; Perrinton, Michigan; and Lewisburg, Tennessee. In 1957, Respondent received additional requests from other new customers to pack milk under their private labels, and as a result, in May, 1957, it began canning private-label evaporated milk at its Chester, South Carolina, plant.

30. The evidence shows that all of these new private-label purchasers came to the Respondent of their own accord, and were not solicited by the Respondent; that Respondent dealt with them in the same manner in which it had dealt with its previous private-label customers; and that Respondent made no distinction between large and small accounts. Respondent's private-label prices were in each instance determined by the use of its cost-plus pricing formula.

31. In determining the amount of the gross margin to be included in the price of private-label evaporated milk, Witness Barry, production merchandising manager for the Borden Company, testified that the Respondent followed the same practice which it had followed in the past, of selling at the highest possible price, so as to obtain the maximum amount of profit, and yet not at a price so high as to create an undue risk of losing the business to other private-label canners.

XIII. *Midwest Competitors of The Borden Company*

32. Representatives of seven relatively small canners of evaporated milk located in the Midwest, including Ohio, Indiana, Illinois, Michigan, Iowa, Missouri and Kansas, testified in support of the complaint. Although each of these seven milk canners sold evaporated milk both under their own labels and under private labels, by far the larger percentage of their evaporated-milk business consisted of the sale of private-label milk. None of them advertised or sold their product on a national level, and all of them sold their private-label evaporated milk, with minor exceptions, on a delivered-price basis. None of these canners had plants east or south of the Ohio River or south of the Missouri-Arkansas state line. In fact, no evaporated-milk producers at all had plants in the eastern or southern areas, other than the Respondent and its two largest competitors, Pet and Carnation.

a. *Page Milk Company*

33. The testimony of Mr. George B. Page, president of the Page Milk Company, shows that his company canned evaporated milk at plants located in Merrill, Wisconsin, and Coffeyville, Kansas. The milk produced at the Wisconsin plant was shipped principally to customers in the metropolitan east, whereas the Kansas plant served the area west of the Mississippi River. The annual sales volume of the Page Milk Company from 1950 through 1957 was:

1950	701,100 cases;
1951	647,705 cases;
1952	687,858 cases;
1953	761,168 cases;
1954	714,318 cases;
1955	720,884 cases;
1956	726,443 cases; and
1957	735,803 cases.

34. During the period covered by the complaint, the Page Milk Company lost to the Respondent sales of about 3,650 cases of evaporated milk, based upon the volume of sales for the previous twelve months. The purchaser was the Kimbell Grocery Company, Fort Worth, Texas, with six locations in Texas and New Mexico. The date of Kimbell's last order to Page was February 3, 1958, and the purchase price on that order was \$6.03 per case of tall 48s, including delivery, with a 2% cash discount. Kimbell's first order from Respondent was dated March 14, 1958, and shows a price of \$5.44 per case of tall 48s, f.o.b. Respondent's plant, with a label charge of 9¢ per case, and a swell allowance of 1%.

35. The record does not show specifically what private-label business was gained by Page during the period covered by the complaint, but it does show a gain of 9,360 cases of tall 48s evaporated milk in 1957 over 1956. This gain more than balances the loss to Borden that the Page Milk Company sustained during that same period. Mr. Page testified, however, as follows:

" * * The entry of the Borden Company into the private-label business and the manner in which they have been operating has placed a severe competitive pressure on the entire un-advertised brand of private-label milk structure and that has, in my opinion, largely been felt in the way of a lowered market price with which we must contend."

b. *United Dairy Company*

36. Mr. Jack D. Anderson, vice president and general manager of the United Dairy Company (hereinafter referred to as United Dairy), testified that his company had evaporated-milk plants located at Barnesville, Lodi and Waterford, Ohio, and that its principal sales territory consisted of the Northeastern states east of Ohio, and extending as far south as Virginia and West Virginia. United Dairy's annual domestic sales volume of evaporated milk during the years 1950 to 1957, inclusive, was:

1950	754,666 cases;
1951	610,171 cases;
1952	641,862 cases;
1953	636,945 cases;
1954	738,315 cases;
1955	887,651 cases;
1956	1,041,041 cases;
1957	958,373 cases.

37. During 1956 United Dairy lost two accounts, Penn Fruit Company, Philadelphia, Pennsylvania,

and Brockton Public Markets, Brockton, Massachusetts, which had totaled 8,990 cases of evaporated milk over the previous twelve months, to Topco, which was purchasing from the Respondent. During 1957 United Dairy lost the Central Retailer-Owned Grocers account, with an annual volume of 3,425 cases, to the Respondent. United Dairy's total 1957 sales of 958,373 cases, although less than its 1956 sales of 1,041,041 cases, still constituted its second-highest annual volume for the eight-year period from 1950 through 1957; and the 3,425 cases lost to the Respondent were only a small portion of its total drop of 82,668 cases in sales during 1957. The record does not disclose the reason for all of this decrease in sales. Three of the four accounts lost by United Dairy to the Respondent or customers of the Respondent were, however, located considerably closer to the Respondent's plants than to United Dairy's plants.

38. Witness Anderson complains particularly of the competition of Respondent since 1956, as follows:

"The competition has forced our prices down from the level we had previous to that and some of the competition has been selling on a different basis. On an f.o.b. basis and it is made highly competitive because of those factors."

c. Westerville Creamery Company

39. Mr. William L. Johnson, president and general manager of Westerville Creamery Company (hereinafter referred to as Westerville), testified that his com-

pany produced evaporated milk, fluid milk, powdered milk, cottage cheese and ice cream, and that it had an evaporated-milk plant located in Covington, Ohio, from which it sold products in the eastern section of the United States, from Maine to Florida. The company's annual sales of evaporated milk for the years 1950 through 1957 were:

1950	641,981 cases;
1951	597,171 cases;
1952	455,127 cases;
1953	571,574 cases;
1954	656,745 cases;
1955	701,847 cases;
1956	593,739 cases; and
1957	589,242 cases.

40. The record shows that Westerville lost five accounts in 1956, with an annual volume aggregating 102,931 cases, approximately the amount by which that company's 1956 sales volume declined as compared with its 1955 volume, as shown by the table above. None of those accounts were lost to the Respondent. In fact, Mr. Johnson testified that Westerville was not in competition with the Respondent until the following year, 1957. In that year, however, Westerville lost six accounts, which subsequently began purchasing from Respondent's customer Biddle. This loss involved a volume of approximately 38,462 cases per year. Mr. Johnson blamed this downward trend in his company's sales of evaporated milk upon the Respondent's competition.

41. In fairness, however, it must be observed that such a trend started before the Respondent gained any of Westerville's customers, and that Westerville's loss of business in 1956, which was not attributable to Respondent or its customers, was nearly three times as much as the volume of the business lost to Respondent's customer in 1957. Examination of the above table shows that Westerville's annual volume of sales has fluctuated considerably from year to year since 1950.

d. *Gehl's Guernsey Farms*

42. Mr. Paul Gehl, vice president of Gehl's Guernsey Farms (hereinafter referred to as Gehl's), testified that his company produced fluid milk, ice cream, condensed milk of various kinds, and powdered milk, as well as evaporated milk, at its plant located at Germantown, Wisconsin, with a sales territory principally in the eastern United States, consisting of an area east of the Mississippi and north of the Ohio River. Gehl's annual sales volume of evaporated milk for the years 1950 through 1957 was:

1950	155,417 cases;
1951	154,293 cases;
1952	138,124 cases;
1953	84,735 cases;
1954	119,395 cases;
1955	108,924 cases;
1956	168,479 cases; and
1957	285,544 cases.

43. In 1956, Gehl's lost to the Respondent business amounting to 4,077 cases of evaporated milk. During

the same year, however, Gehl's had a 55% increase in its sales volume, from 108,924 cases in 1955 to 168,479 cases in 1956. During 1957 Gehl lost to the Respondent an account amounting to 21,357 cases a year. Despite that loss, Gehl had gained in volume of sales from 168,479 cases in 1956 to 285,544 cases in 1957.

44. With respect to all the business lost by Gehl to the Respondent, it should be observed that the Respondent's plants were substantially closer to the location of the accounts lost by Gehl than was Gehl's plant at Germantown, Wisconsin. Dixie Home Stores in Greenville, South Carolina, which accounted for 80% of the volume involved in this loss by Gehl to the Respondent's customer, was at least 600 miles from Gehl's plant in Wisconsin, but only seventy miles from Respondent's plant at Chester, South Carolina.

e. Dairyland Cooperative Association

45. Mr. John E. DeMaster, a sales official of Dairyland Cooperative Association (hereinafter referred to as Dairyland), testified that his organization had one evaporated-milk plant located at Juneau, Wisconsin. Dairyland was described as a cooperative engaged in the processing of raw milk into butter, powdered milk, and cheese, as well as evaporated milk. He defined its sales area rather vaguely as "the central states east of the Mississippi". Dairyland's sales of evaporated milk from 1950 through 1956 were:

1950	38,754 cases;
1951	334,131 cases;
1952	173,346 cases;
1953	17,423 cases;
1954	28,799 cases;
1955	25,766 cases; and
1956	49,404 cases;

46. In 1956, Dairyland lost to the Respondent eight accounts amounting to approximately 22,320 cases of evaporated milk. As to seven of these accounts, the Respondent's plant was substantially closer to the customer's location than was Dairyland's plant in Wisconsin. There was one exception, Kline's Supply Markets, St. Paul, Minnesota, which was approximately the same distance from both suppliers' plants. Mr. DeMaster stated, with reference to the lost business of Dairyland, that " * * * we paid practically the same price for milk that they did, and naturally it is Pittsburgh and to the east where they would have a freight advantage, which was okay. It was one of those things; that is the way it was; it could not be helped."

47. When asked specifically how he accounted for the loss to his company of sales of evaporated milk from 1950 through 1957, Witness DeMaster again placed primary responsibility for the decrease upon his geographical location relative to the competitors and buyers located in the East. He specifically named the Westerville and Defiance milk-producing organizations as competitors in the Ohio area; and he did not blame the Respondent for the loss to his own company

of this evaporated milk business, or for its going out of business in 1957.

f. Defiance Milk Products Company

48. Mr. William A. Diehl, president of Defiance Milk Products Company (hereinafter referred to as Defiance), testified that his company produced evaporated milk at its plant at Defiance, Ohio, and sold it principally in the eastern part of the United States north of Norfolk, Virginia. His company's annual sales of evaporated milk for the years 1951 through 1957 were:

1951	623,248 cases;
1952	646,869 cases;
1953	692,978 cases;
1954	738,880 cases;
1955	739,886 cases;
1956	699,952 cases; and
1957	694,166 cases.

49. The record shows that Defiance lost the sale of 2,400 cases of evaporated milk to the Respondent in 1956. That loss was, however, only a small percentage of Defiance's total loss of such sales during 1956, at which time, Mr. Diehl stated, Respondent had not yet become a factor in the private-label evaporated milk field.

50. In 1957 Defiance lost the sale of 70,406 cases of evaporated milk to customers of the Respondent, including two Colonial Stores located, respectively,

at Norfolk, Virginia, and Raleigh, North Carolina; but in the same year Defiance gained from some unknown source or sources a larger volume of sales than it lost to these customers. The two Colonial Store accounts, which represented approximately two-thirds of that loss of business, were located hundreds of miles closer to the Respondent's supplying plant at Chester, South Carolina, than to Defiance's plant at Defiance, Ohio. Mr. Diehl's testimony reveals that he was thoroughly aware of the importance of plant location in relation to the plant's market, and that he was considering acquiring equipment for packing evaporated milk at a newly-acquired plant at Jonesboro, Tennessee.

g. Nashville Milk Company

51. Mr. Diehl further testified that he was also president of the Nashville Milk Company (hereinafter referred to as Nashville), a wholly-owned subsidiary of Defiance. He explained that Nashville's plant which produced evaporated milk was at Nashville, Illinois, and that it sold that product in the southeastern part of the United States, in the area south of Norfolk, Virginia, and east of Knoxville, Tennessee. Nashville's annual sales volume for the years 1951 through 1957 was:

1951	56,070 cases;
1952	87,283 cases;
1953	99,204 cases;
1954	125,489 cases;
1955	132,863 cases;
1956	150,645 cases; and
1957	158,811 cases.

52. During 1956 Nashville lost the sale of 2,100 cases of evaporated milk to the Respondent, and during 1957 that loss was increased by 62,940 cases. From the fact, however, that Nashville's sales volume increased by 13% in 1956 over 1955, and by another 5-1/2% in 1957 over 1956 despite its losses of sales to the Respondent, it is apparent that Nashville gained from some source a volume of sales more than equal to that lost to customers of the Respondent. Its sales volume in 1957 was the highest in its entire history.

XIV. *Relationship Between Respondent's
Prices of Evaporated Milk and
Competitors' Loss of Business*

53. Counsel supporting the complaint has requested a finding which emphasizes the Respondent's size and the favorable geographical locations of its plants as compared to its Midwest competitors, as follows:

"An important factor leading to the competitive disparity between Borden and the smaller independent evaporated milk packer was that in the period January 1956 through March 1958, Borden had nine evaporated milk plants in contrast to its smaller competitors with one, two or three plants. This gave Borden greater flexibility to take advantage of favorable freight rates and thus to compete on more favorable terms than its smaller competitors in a wider area."

54. The record warrants the requested finding of fact, which we here adopt. In fact, the record shows that of the 241,815 cases of evaporated milk, the sale of which was gained by the Respondent from its Midwest competitors during the period covered by the complaint, as to at least 208,170 cases, or approximately 86%, the Respondent had a clear freight advantage over its Midwest competitors. This advantage was, of course, due to Respondent's more convenient locations. In considering this factor, it should be remembered that a similar geographical advantage on the part of other competitors caused the Respondent to lose sales of evaporated milk in the Northwest area of the United States during the eighteen months' period preceding the period covered by the complaint.

55. Four of Respondent's Midwest competitors, namely, Page, United, Gehl's and Nashville, had increased volumes of sales both in 1956 and in 1957, as compared with their sales in 1955. The only two of the seven competitors who, in 1957, had a smaller volume of sales than in 1955 had, in fact, suffered their major decline in sales in 1956, at a time when the Respondent was not regarded by them as a competitor.

56. The market share data of evaporated milk for the entire United States, as compiled by the Department of Agriculture in pounds and converted by the Department's recommended formula into cases of "talls", shows the individual sales of evaporated milk by Respondent and its Midwest competitors, for the years 1955 through 1957, as follows:

Market Share Data (Tall Case Basis)

	1955		1956		1957	
	Sales	Market	Sales	Market	Sales	Market
	Volume	Share	Volume	Share	Volume	Share
Total Industry	52,804,598	100%	51,862,069	100%	50,666,667	100%
Packers on whom evidence was introduced:						
Page Milk Co.	720,884	1.4%	726,443	1.4%	735,803	1.5%
United Dairy Co.	887,651	1.7%	1,041,041	2.0%	958,373	1.9%
Westerville Creamery Co.	701,847	1.3%	593,739	1.1%	589,242	1.2%
Gehl Guernsey Farms	108,924	.2%	168,479	.3%	285,544	.6%
Dairyland Cooperative	25,766	.05%	49,404	.1%	None*	None*
Defiance Milk Co.	739,886	1.4%	699,593	1.4%	694,166	1.4%
Nashville Milk Co.	132,863	.3%	150,645	.3%	158,811	.3%
Total	3,317,821	6.3%	3,429,704	6.6%	3,421,939	6.8%
The Borden Company	5,235,852	9.9%	5,010,205	9.7%	5,419,108	10.7%

*Discontinued evaporated-milk production in April, 1957.

57. The above chart shows that Respondent's market-share increase during the years in question was less than 1%, and that the market-share changes of its Midwest competitors were also slight.

58. The evidence shows that Respondent's private-label prices during the period in question were computed in accordance with its former practice, including a gross-margin-of-profit factor which was never less than 15c per case, and ranged as high as 35c per case. The lowest profit margin, 15c per case, was at its Modesto plant, and there is no evidence that Respondent obtained any private-label business from other packers at that plant. The Respondent's plants to which most of such business came were located at Lewisburg, Tennessee; Chester, South Carolina; and Wellsboro, Pennsylvania. It was at those plants that the Respondent set the highest gross margin during the complaint period. Moreover, there is no evidence, and no basis for any inference, that the Respondent acted, at any time during the period covered by the complaint, with any purpose of harming or eliminating any competitor, or with any vindictive or predatory motive.

59. It appears to us that the present controversy, as interpreted by counsel supporting the complaint, has arisen because of three competitive advantages which have been acquired by the Respondent during its many years in business, namely: its size, the location of its plants, and its consequent ability to sell private-label evaporated milk profitably on an f.o.b. basis. Counsel supporting the complaint contends:

"Even if the testifying competitors had not lost any business to the Respondent, actual substantial injury to competition would have to be inferred from the fact that Respondent's

discriminatory pricing, coupled with the competitive advantages stemming from its size* and advantageously located evaporated milk plants, has effectively foreclosed the independent packer group from selling to certain of the most desirable private label accounts with great potential volume; for Respondent has been able to negotiate agreements covering the sale of private label milk to certain large buying organizations on a permanent basis for periods of indefinite duration covering all or most of the private label requirements of such customers.

“*The testimony of Mr. Page at R. 264-5 documents the difficulty with which the small packer is faced in selling to large scale accounts, for this testimony indicates that Page in early 1956 could supply only a portion of the Winn-Dixie business when this account expressed its interest in purchasing private label from Page for its entire operation.”

60. From the above statement, it appears that counsel supporting the complaint would have us find injury to competition because of three factors, namely:

a. The “competitive advantage [of the Respondent] from its size”, resulting in Respondent’s ability to supply a larger demand for evaporated milk from a single customer than could its competitors;

b. The advantage of lower transportation cost inherent in the geographical location of Respondent's plants nearer to the Eastern markets than those of its Midwestern competitors; and

c. Respondent's use of a pricing formula in selling private-label evaporated milk f.o.b. plant instead of at a delivered price, which was advantageous to Respondent's customers as well as to Respondent because of the location of its plants.

61. These competitive advantages which counsel supporting the complaint would have us condemn as unlawful are the accumulated benefits of that private initiative, industry and business acumen which our system of free enterprise is designed to foster and reward.

62. If a supplier is to be penalized because its size enables it to negotiate and fulfill contracts for a product in larger amounts than its competitors can produce, then the efficient conduct of a business, and its resultant growth, have become legal detriments.

63. If a supplier be forbidden to pass on to its customers a saving in transportation costs, made possible by the fact that its plant is more advantageously located than those of its competitors, then the supplier is, in effect, required to add to its selling price a "phantom freight" — a charge equal to the difference be-

tween its cost of transportation and that of its less conveniently located competitor.

64. Furthermore, if a supplier is to be penalized for selling its product at a lower price f.o.b. its plant, instead of adding thereto the cost of transportation to the customer's plant and selling at a higher delivered price, the supplier's right to conduct its business in the manner it deems most practical is abrogated, and its customers are thereby deprived of the legitimate saving in cost which they might otherwise obtain by electing to take delivery at the supplier's plant. Such an edict would injure both the Respondent and its customers, by depriving them of what would appear to be a basic right of free business enterprise.

65. We conclude that the above-described contentions are beyond both the allegations of the complaint and the theory upon which it is predicated. We conclude further that all the above factors, whether considered separately or collectively, constitute lawful commercial advantages of the corporate Respondent. Furthermore, we conclude that Respondent has made only lawful use of such lawful advantages, and that the resulting effect upon the sales of its Midwest competitors has been only that of the normal give-and-take of healthy competition inherent in the free-enterprise system. Such competition is not unlawful.

*XV. Possible Injury to Competition Between
Wholesaler Customers of The Respondent*

66. The record contains evidence of only ten transactions wherein a purchaser of Respondent's private-label

evaporated milk was shown to have paid a lower price than that paid by a competing customer purchasing Respondent's Borden Brand evaporated milk.

67. Counsel supporting the complaint questioned a small group of wholesaler purchasers, who were all from North or South Carolina, relative to their interest in buying private-label evaporated milk in addition to their purchases of Borden Brand evaporated milk. In his interrogation of these witnesses, he did not ascertain whether they knew of the business requirements involved in the purchase of Respondent's private-label milk, which were rather complicated, as distinguished from the simple purchase of Borden Brand evaporated milk. These witnesses were asked hypothetical questions, of which the following is typical:

"Q. Well, Mr. McFeely, in February as in March you were paying \$6.60 a case for Borden Brand evaporated milk. Using the month of March, 1958, as a basis, would you have been interested in buying out of Spartanburg, with a shipment from Chester, South Carolina, private-label evaporated milk packed by the Borden Company at a price of \$5.00 to \$5.25 per case for talls?"

68. We believe that the phrasing of this question implied to the witness that the conditions of the purchase of Borden Brand evaporated milk at \$6.60 per case, or of private-label evaporated milk packed by the same company at \$5.00 or \$5.25 per case, were otherwise substantially the same. In each case, the witness gave an affirmative response. The record shows that the terms and conditions

upon which Respondent sold its private-label evaporated milk differed materially from the simpler purchase of Borden Brand milk. Those differing terms and conditions may be summarized as follows:

*Private-label
evaporated milk*

No cash discount.

All orders sent to Respondent's headquarters in New York and filled through Respondent's plant nearest the purchaser.

Price f.o.b. Respondent's plant.

Variable increase in cost of transportation on less-than-carload shipments.

Varying cost of designing and printing private labels.

Must be arranged for well in advance; purchaser obligated to pay for all milk packed under his private label.

No advertising or services furnished by Borden on private-label milk.

*Borden Brand
evaporated milk*

2% cash discount.

Orders handled locally and filled from nearest plant or from Respondent's warehouse.

Price delivered to customer.

5¢ per case additional on less-than-carload shipments.

No charge for labels.

Can be bought in any quantity at any time without pre-arrangement.

Purchaser benefited by Respondent's advertising and services.

69. Since the record does not show that the witnesses who answered the hypothetical question in the affirmative were aware of all of the above conditions, we cannot assume, without further evidence, that they understood all the considerations involved in contracting for Respondent's private-label evaporated milk. Accordingly, their response to the hypothetical question proves no more than that each of the witnesses was interested in paying less for evaporated milk.

70. Wholesaler McFeely, under cross-examination, admitted that in order for him to be interested in the purchase of private-label evaporated milk, he would have to be able to buy it for \$1.50 to \$2.00 per case less than he was paying for Borden Brand. It should be observed in this connection that Respondent was not offering its private-label milk for that much less than its Borden Brand milk.

71. One purchaser talked with a broker concerning the possible purchase of a private-label brand from the Respondent, and was told by the broker that he did not know the requirements for such a purchase. There is, however, no evidence that any purchaser was, for any reason, denied the right to buy private-label evaporated milk from the Respondent.

72. We must conclude that there has been no substantial injury to competition affecting Respondent's wholesaler customers purchasing Borden Brand evaporated milk, in their competition with Respondent's wholesaler customers who also purchased Respondent's private-label evaporated milk.

XVI. *Possible Injury to Competition Between Retailer Customers of The Respondent*

73. Seven retailers in South Carolina were called as witnesses by counsel supporting the complaint. Each testified that he carried Borden Brand evaporated milk in his usual course of business, as well as Pet and Carnation. Each recognized that there existed a strong consumer demand for Borden Brand evaporated milk, and that it com-

manded a higher price than unadvertised brands. All regarded the handling of evaporated milk as an unprofitable part of their retail grocery business, but necessary because of the continuing consumer demand therefor. One witness stated:

"Well, [Borden Brand evaporated milk] is a must item * * * Well, you have got to handle [Borden Brand] to satisfy the customers."

Another witness testified, similarly:

"Well, [Borden Brand evaporated milk] is essential in the grocery business and it's one of the items that we feel like we handle more or less just to have something the housewife needs. Several other items in that same category, you know."

74. They described their mark-up on Borden Brand evaporated milk as ranging from 23c to 84c per case. They did not, in general, regard this as sufficient to cover overhead expenses. The testifying retailers purchased Borden Brand evaporated milk from a wholesaler who had, in 1957, offered them the Miss Virginia Brand, a private-label evaporated milk produced by the Respondent. Witness Shumpert testified that he commenced purchasing Miss Virginia evaporated milk about a month after it had been offered him. Witness Power's testimony shows that he waited approximately eighteen months after such offer, or until about two weeks prior to the time of his testimony, before commencing to purchase the Miss Virginia

Brand evaporated milk. Retailer witness Caughman testified that he waited until about a year after the first offer before commencing to purchase. Witness Cromer testified that he waited almost a year before buying Miss Virginia milk. Witnesses Charles and Coleman, at the time of their testimony, had not purchased Miss Virginia evaporated milk. Witness Wrenn, who operated both as a wholesaler and as a retailer, at various times carried evaporated milk packed under various private labels, which he purchased from railroad salvage. He never requested the Respondent or any other packer to produce a private label for him.

75. On one hand, the retailers described some customers as "price conscious," who were "shopping around for cheap milk". On the other hand, they described other customers as being "name-conscious" and demanding the advertised brands, without particular regard for the differences in price. A typical example of such testimony is:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them don't want anything except Pet.

"Q. They don't care what price —

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants,

you couldn't interest her in something else."

From such testimony we must conclude that there was in the South Carolina area a persistent demand among a substantial number of purchasers for Borden Brand evaporated milk, without particular regard to price.

*XVII. Conclusion as to Effect of Price
Differences Upon Competition*

76. We must conclude that the differences in price between Respondent's Borden Brand evaporated milk and its private-label evaporated milk have not substantially lessened competition, nor is there any reasonable probability of such danger to competition in the future. The complaint herein should, therefore, be dismissed.

XVIII. Cost Justification

a. Purpose and Preparation

77. After counsel supporting the complaint had rested his case-in-chief, counsel for the Respondent offered in evidence an analysis based upon the records of the Borden Company for the calendar year 1957, pertaining to the production, distribution and sale of Borden Brand evaporated milk and Borden's private-label evaporated milk. The purpose of that analysis was to determine the difference between the price received by the Respondent for its product under each type of label, and the relative difference in cost of manufacture, sale and delivery thereof resulting

from the different methods or quantities involved in the sale or delivery of the product under the different labels.

78. The analysis was prepared in 1959 by Edward M. Darcey of the accounting firm of Haskins & Sells of New York City. Mr. Darcey, who had supervised the regular audits of the Respondent's accounts since 1953, was shown to have a detailed familiarity with Respondent's accounting system. Mr. Darcey was advised both in the preparation of his analysis and in its execution by Dr. Herbert F. Taggart, professor of accounting of the University of Michigan, and Chairman of the Advisory Committee on Cost Justification which was appointed by the Federal Trade Commission in 1953 to review and analyze all aspects of the cost proviso of the Clayton Act.

79. All the documentary materials underlying the analysis were made available to the Commission's staff, and Mr. Melvin Steele, Assistant Chief Accountant of the Accounting Division, Bureau of Investigation, of the Federal Trade Commission, and another of the Commission's accountants examined them in New York during five weeks in February and March, 1960. At the end of their study, and as a result of conferences between Mr. Steele and Mr. Darcey, three minor changes were made in the report, the effect of which was reduce the difference in cost between Borden Brand and Borden's private-label brands by about 1c per case. As so modified, the cost analysis was received in evidence as Respondent's Exhibit 76.

b. *Production Methods*

80. Before examining a summary of that exhibit and the cost analysis which it contains, we should review certain important factors. In 1957 Respondent produced evaporated milk at nine plants variously located in California, Oregon, Wisconsin, Michigan, Illinois, Kansas, Tennessee, South Carolina and Pennsylvania. Each of those plants packed private-label as well as Borden Brand evaporated milk, with no difference in the manufacturing process up to the point of affixing labels. Thereafter, Borden Brand and the private-label brands were handled differently. Borden Brand evaporated milk was packed in printed cartons bearing the Borden name, whereas private-label milk was packed either in printed cartons bearing a private label, or in plain cartons on which a private-label identification was stenciled.

c. *Marketing Methods — Borden Brand*

81. In 1957 Borden Brand evaporated milk was sold in various states across the country at a uniform delivered price. Substantial inventories of Borden Brand evaporated milk were carried in three types of storage facilities: (1) at the plants which produced the milk; (2) at about fifteen reserve warehouses located between the plants and the places where it was expected that the evaporated milk would be sold; and (3) at about one hundred local consignment warehouses. Carload shipments were made from the plants and reserve warehouses direct to customers, and also to consignment warehouses. Orders for less-than-car-

load quantities were generally filled from the consignment warehouses. All customers were offered a 2% cash discount for payment within ten days, and retail customers were offered a 1/10-of-1% "swell allowance" in lieu of credit for or replacement of goods found to be in unsalable condition. Orders for Borden Brand evaporated milk were solicited by brokers, and, in some of the larger cities, by Respondent's jobbing salesmen. Both brokers and jobbing salesmen handled, in addition to Borden Brand evaporated milk, all of the other Borden Brand food products manufactured and sold through Respondent's Food Products Division, including Starlac, Eagle Brand condensed milk and instant coffee. Orders for the delivery of Borden Brand evaporated milk direct from a producing plant or reserve warehouse were generally forwarded to the Respondent's New York office of its Food Products Division, which in turn forwarded them to the appropriate shipping point; while orders for delivery from a consignment warehouse were processed in the field.

82. Respondent's Food Products Division maintained a staff of field representatives, whose primary duty was to call upon retailers to assist them in promoting sales of Borden products to consumers. These field representatives operated in all areas, regardless of whether orders were solicited by brokers or by Respondent's jobber salesmen. The work of the field representatives included such activities as arranging displays and display space, and inspecting code-datings on Borden Brand evaporated milk to insure that the older milk was sold first in order to prevent its remaining too long on the retailer's shelves. This service

was not performed in every store carrying Borden Brand evaporated milk. The field representatives were furnished sales-promotion material designed to direct consumers' attention to Borden Brand products, and to encourage the retailer to devote additional or special effort to the promotion of those products. While the sales representatives were responsible for the promotion of all Borden Brand food products, they devoted special attention to Borden Brand evaporated milk, which was the leading product of the Food Products Division.

83. Advertising of the Borden name and of the Borden Brand products was financed through a budget administered at the Borden Company level, and, as to particular food products, at the level of the Food Products Division, which maintained a separate budget account for each individual product. The Borden Brand evaporated milk also carried on the label coupons which were redeemable by consumers for merchandise, in the manner of trade stamps.

d. *Marketing Methods — Private-Label Brands*

84. In 1957, private-label evaporated milk was sold from the Borden Company's plants, and inventories of such milk were maintained only at those plants. Orders for private-label milk were sent direct to the New York office of Respondent's Food Products Division, which thereafter forwarded them to the plant nearest the customer. Prices were f.o.b. plant, and were determined each month for each plant. Respondent did not advertise its private-label milk, and such

milk carried no reference to the Borden name. Furthermore, the purchasers of such private-label milk were forbidden by Respondent to use the Borden name, in any way, in the distribution and sale of the product. No field services were performed by Respondent in connection with private-label evaporated milk.

e. Cost Analysis Prepared on a Nation-Wide Basis

85. In the opinion of Mr. Darcey and Dr. Taggart, the cost analysis which they prepared was necessarily predicated upon Respondent's production and sales of evaporated milk throughout the United States. In their opinion, the relative costs of Borden Brand evaporated milk, and of private-label evaporated milk, could be correctly determined only by considering the over-all expenses incurred by Respondent in producing and selling such milk at all the various locations in which Respondent sold its milk. As previously stated, Respondent's cost of producing its Borden Brand and private-label brand evaporated milk was the same until the labels were applied. Each item of expense thereafter, such as labels and cartons, freight, storage, advertising, and so on, for all Respondent's plants was averaged, both for Borden Brand milk and for private-label milk, on a nation wide basis, and that average compared with the average selling price of the respective products.

86. On that basis, Respondent determined that the difference between its selling price per case of Borden Brand evaporated milk and its average selling price

per case of private-label evaporated milk had been more than justified by an excess of \$.1780 per case in the average cost thereof.

f. *Summary of Cost Analysis*

87. Respondent's summary of the cost analysis contained in Respondent's Exhibit 76 varies from that exhibit in several respects so infinitesimal that they have been disregarded. That summary is as follows:

Respondent's Cost Analysis

1 9 5 7

Average Per Case

	Borden Brand	Private Label	Difference
Gross Sales	\$6.4046	\$5.1743	\$1.2303
Less Sales Deductions:			
Damaged Goods .....	.0112	.0027	.0085
Cash Discount Offered ....	.1279	—	.1279
	<hr/>	<hr/>	<hr/>
Net Sales	\$6.2655	\$5.1716	\$1.0939
Costs:			
Labels and Cartons	\$.1789	\$.1376	\$.0413
Primary Freight .....	.3684	.0188	.3496
Secondary Freight .....	.0112	—	.0112
Reserve Storage .....	.0690	—	.0690
Consignment Storage ....	.0305	—	.0305
Investment Cost .....	.0972	.0568	.0404
Premium Label Re- demption .....	.2316	—	.2316

Advertising .....	.1247	—	.1247
Sales Department .....	.3163	.0009	.3154
Brokers' Commissions ....	.0427	—	.0427
Promotion Department....	.0189	.0123	.0066
Clerical .....	.0151	.0062	.0089
<hr/>			
Total	\$1.5045	\$.2326	\$1.2719
Difference in Cost		\$1.2719	
Difference in Price		1.0939	
<hr/>			
Excess of cost difference over price difference =		\$.1780	

*XIX. Cost Study Prepared, and Presented in
Rebuttal, by Mr. Melvin C. Steele*

a. Cost Failure of \$.4025 Per Case

88. Counsel supporting the complaint recalled Mr. Melvin C. Steele, who testified that he had prepared a memorandum reviewing Respondent's cost analysis as presented in Respondent's Exhibit 76, and a cost study of his own, which he described as follows:

" * * A summary has been prepared of the price differences and the cost difference between the sale and distribution of Borden brand and private label evaporated milk by the respondent during the year 1957. The sales were limited to shipments from the respondent's Chester, S. C. and Lewisburg, Tenn. processing plants. The summary shows a net price difference, after deducting damaged

goods and cash discount, of \$1.4181 per case while the total cost difference was \$1.0156 which indicated a cost failure of \$.4025 per case. The respondent's cost study showed a cost difference over price difference of \$.1891 per case."

Mr. Steele's memorandum containing the above summarization was received in evidence as Commission's Exhibit 5479.

b. Choice of Two Plants as Basis for Cost Study

89. Mr. Steele's testimony revealed that he was directed by counsel supporting the complaint to make this cost study, and to limit it to the cost data pertaining to Respondent's Chester, South Carolina, and Lewisburg, Tennessee, plants only, the two plants at which Respondent's private-label evaporated milk had been sold in 1957 at the lowest prices. Although Mr. Steele testified that the basing of his study upon two plants only was a proper method under "the circumstances", the exact nature of the "the circumstances" was never satisfactorily explained. He also testified that the Respondent's nation-wide cost analysis was not proper cost accounting, but the reason for that conclusion was likewise never made clear.

90. We must observe that during the pre-complaint investigation of Respondent's price structure, prior to this proceeding, Mr. Steele, in a memorandum based upon data furnished him by the Respondent on a national basis, expressed the opinion that Respondent's

price difference was justified by its costs. At that time he made no suggestion that a study should have been made on the basis of only two of Respondent's plants, rather than upon a national basis including all of Respondent's nine plants.

91. Mr. Steele, in his computation of the two-plant analysis, took into account a particular amount of freight cost incurred by the Respondent in shipping 1,200 cases of Borden Brand milk from Chester, South Carolina, to Colonial Stores in Norfolk, Virginia, on November 18, 1957. The amount of that freight cost was 21c per case. None of the accountants questioned these facts. On the same day, however, the Respondent also shipped to the same customer in the same city, from the Respondent's plant in Dixon, Illinois, 800 cases of Borden Brand milk, on which the freight cost, also readily ascertainable from the Respondent's records, was 47c per case, or 26c per case greater than, and more than twice as much as, the freight on the above-mentioned shipment from the Respondent's plant in Chester, South Carolina. Mr. Steele did not take the latter freight cost into account in his analysis. While the figure which Mr. Steele did use, the 21c per case on the shipment from the Chester plant, was mathematically accurate, his exclusion of the other, and much higher, figure of freight cost on the shipment from the Dixon plant necessarily means that, as to business done by the Respondent with that customer in Norfolk, Virginia, Mr. Steele's analysis does not reflect the Respondent's full cost.

92. Counsel supporting the complaint contend that they did not offer Mr. Steele's cost study in evidence "to show a correct cost-justification defense, but merely to show the distortion resulting from the Respondent's broad over-all averaging in Respondent's Exhibit 76 by the contrast with a two-plant average." The two-plant study presented by counsel supporting the complaint does, as they suggest, show a distortion, but we believe that the distortion is in the two-plant study itself.

c. Corrected Cost Failure Reduced to \$.2673

93. During cross-examination Mr. Steele discovered several errors in his cost study, all of which were adverse to the Respondent, and, when corrected by Mr. Steele, showed the cost failure indicated by his two-plant study to be only \$.2673 per case, instead of \$.4025 as originally stated. This correction reduced the unjustified remainder of the difference in price by \$.1352 per case. Mr. Steele's corrected summarization was received in evidence as Respondent's Exhibit 114.

d. Conclusion as to Two-Plant Cost Study

94. We believe that, in a greater or lesser degree, every accounting datum, no matter how precisely determinable in isolation, is meaningful in this proceeding only if considered in relation to all of the other cost and price data. So believing, we conclude that the two-plant cost study in question does not constitute an adequate basis for a cost-justification study, nor an effective rebuttal of Respondent's cost-justification defense.

*XX. Items of Cost in Respondent's Analysis
in Dispute Between Accountants*

a. Investment Cost of \$.0404 per case

95. As we have previously observed, Respondent, in order to have its Borden Brand evaporated milk available for immediate delivery throughout the country, maintained a substantial inventory thereof in all its plants, reserve warehouses and consignment warehouses. As to private-label evaporated milk, however, Respondent maintained in storage at the plant of its production only a supply sufficient to fill the orders of its private-label customers which it had already received. This difference in the method of storage in the process of sale and delivery of the Borden Brand and private-label milk resulted in a substantially higher investment by the Respondent in its Borden Brand milk than in its private-label milk.

96. Respondent, in its cost-justification analysis, concludes that the money invested in both Borden Brand and private-label evaporated milk during the time it was held in storage, valued at the rate of 8%, resulted in an average cost of \$.0835 per case for the storage of Borden Brand milk, and an average cost of \$.0257 per case for private-label milk.

97. Mr. Steele did not question the Respondent's figures as to the money invested, nor that this constituted a real cost to the Respondent; nor did he question the soundness of the aforesaid 8% rate of interest adopted for purposes of the calculation. He did state,

however, that it was not "acceptable as an element of cost for the reason that it is considered to be a payment for the use of capital and not a cost of production and distribution." In his oral testimony, Mr. Steele cited the *Thompson's Products* case, 55 FTC 1252 (1959), in support of his position. In that case, the issue in question involved a claim of a "cost item" computed on the basis of profit, which is an issue quite different from that herein raised. The Commission, in its opinion in the *Thompson's Products* case, stated that "the return rate factor or element here claimed is thus entirely outside the sphere of actual cost differences." In our present case, however, the cost factor is not based upon profit, but is a legitimate element of actual expense which must be borne by Respondent in distributing and selling its product. The Respondent, in the regular course of its business, continually incurs this real cost, which must be taken into account if its cost figures are to reflect its actual expenses.

98. Accordingly, we conclude that the difference of \$.0404 per case in investment cost between Respondent's Borden Brand milk and its private-label milk was properly included by Respondent in its cost analysis as one element of the difference in price between Borden Brand and private-label milk.

b. *Premium Label Redemption Cost of \$.0069 Per Case*

99. Contained in the label of Borden Brand evaporated milk was a premium coupon which was redeem-

able for merchandise. The premiums were redeemable by Premium Associates, Inc., a corporation in which Respondent held 25% of the stock. This corporation served not only the Respondent, but other corporate stockholders, and also non-stockholders, who wished to avail themselves of such premium-redemption coupons and service. The redemption cost of the Respondent's Borden Brand coupons consisted of regular monthly payments by Respondent to Premium Associates, Inc., based upon the number of coupons redeemed during the preceding month, and a payment for special offers. In addition, the Respondent also allocated to its coupon redemption account the amount of an adjustment which was made at the end of the year to the reserve fund maintained to provide for redemption in future years of premium coupons issued in 1957.

100. The facts show that Premium Associates, Inc. has never paid any dividends to its stockholders; that it endeavors to operate on a break-even policy; and that its net income of \$71,757.00 earned in 1957 was not distributed to its stockholders, but retained by the corporation as a reserve fund. Respondent had nothing to credit to its coupon-redemption account from the earnings of Premium Associates, Inc. in 1957. Mr. Steele contends, however, that the total amount of the premium cost, as shown in Respondent's cost analysis, should be reduced by Respondent's 25% share of the net income of Premium Associates, Inc. for 1957.

101. We believe that because the Respondent did not technically, legally or actually receive any in-

come from its investment in Premium Associates, Inc. in 1957, it would be improper to reduce the cost of the premium-label redemption, as shown in Respondent's cost analysis, by any such amount as suggested by Mr. Steele.

c. Advertising Cost of \$.0059 Per Case

102. The Respondent's costs in respect to Borden Brand advertising, as determined by its accountants, were \$.1247 per case. This amount was determined on the basis of an estimate made administratively at Respondent's top-management level. Mr. Steele challenged the soundness of that determination as arbitrary. In lieu thereof, he would make the determination by computing a percentage of Respondent's total sales dollars chargeable to Borden Brand milk for the year 1957. In our opinion, Mr. Steele's method of calculating the advertising cost of Borden Brand milk is sounder than Respondent's method. Accordingly, the amount of Respondent's advertising cost charged to Borden Brand evaporated milk will be reduced by \$.0059 per case, resulting in an advertising cost for Borden Brand milk of \$.1188 per case instead of \$.1250, as shown in Respondent's cost analysis.

d. Broker's Commission Cost of \$.0159 Per Case

103. As stated in Respondent's cost analysis, " * * * Brokers performed the function of selling the Division's [Borden's Food Products Division] advertised products to wholesalers and chains in those areas where the Division did not have its own jobbing sales-

men". The brokers were paid a commission of 5c per case on the sale by them of Borden Brand evaporated milk. The total brokerage paid in 1957 for the sale of Borden Brand evaporated milk was \$170,151.48. This amount represents an average of \$.0394 per case of Borden Brand evaporated milk sold in that year. In addition the Respondent paid brokers at the rate of 2-1/2c per case on some sales of private-label evaporated milk, although the facts show that no substantial service was rendered by them to Respondent in promoting such sales. Respondent contends that this brokerage payment constituted, in effect, an additional brokerage cost chargeable to Borden Brand evaporated milk. Mr. Steele contends, however, that because the brokerage was not paid on all private-label milk sales, and because the amount of the brokerage varied directly with the sale of private-label evaporated milk, the brokerage so paid should be considered as an additional cost applicable to private-label evaporated milk.

104. We believe that Mr. Steele's analysis of this problem is correct, and, accordingly, we conclude that the brokerage cost charged by the Respondent entirely to Borden Brand milk should be charged in part to private-label milk, and that the brokers' commission cost of Borden Brand milk in Respondent's cost analysis should therefore be reduced by \$.0159 per case, the cost of brokerage paid on private-label milk, changing the Borden Brand brokerage cost from \$.0427 per case to \$.0189 per case.

e. Sales Department Cost of \$.0247 Per Case

105. Mr. Steele did not question the accuracy of the Respondent's determination of the amount spent by it to maintain its sales department. He did not question the necessity or soundness of making an allocation thereof between Borden Brand evaporated milk on the one hand, and the other Borden food products on the other hand. The dispute between the accountants relates solely to the formula which should be used in determining that allocation. The Respondent's accountants used as a basis for their calculation all dollar sales, allocating to Borden Brand evaporated milk that proportion of the total unallocated Sales Department expense which the dollar sales of Borden Brand evaporated milk bore to the total sales of all Borden's food products. That proportion was 44.0206%. Mr. Steele contends, however, that this calculation should be based upon the gross profits on Borden Brand evaporated-milk sales compared with the sales of other Borden Brand food products, with the result that he claims the percentage of sales expense to be charged to Borden Brand evaporated milk should be 40.10%.

106. The managing officials showed by their testimony that the touchstone by which they were guided in allocating their sales-department expense consisted of cases sold and sales dollars received. In our opinion, this method of calculation is correct, because cost is properly an element in the calculation of profit, not profit in the calculation of cost. Accordingly, we conclude that the correct amount of sales-department

cost to be properly charged to Borden Brand evaporated milk is \$.3163 per case.

XXI. Conclusion as to Cost Justification

107. In our opinion, the Respondent's cost analysis, as hereinabove modified, constitutes full justification for the differences in price between Borden Brand evaporated milk and Respondent's private-label evaporated milk, within the intent and meaning of §2 (a) of the Clayton Act. It is therefore accepted as an adequate cost-justification defense against the allegations of the complaint herein.

XXII. Summary Conclusion

108. The acts and practices of the Respondent, as herein found, are not in violation of §2 (a) of the Clayton Act as amended.

Accordingly,

IT IS ORDERED that the complaint herein be, and the same hereby is, dismissed.

(Signed) ABNER E. LIPSCOMB
Abner E. Lipscomb
Hearing Examiner.

December 14, 1961.

ORDER PROVIDING FOR THE FILING OF
OBJECTIONS TO PROPOSED ORDER AND REPLY

(Number and Title Omitted)

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

The Commission having rendered its decision in this proceeding, denying the respondent's appeal, granting the appeal of counsel supporting the complaint, vacating and setting aside the initial decision and making its own findings as to the facts, conclusions and proposed order in lieu of findings as to the facts, conclusions and order contained in the initial decision; and

The Commission having determined that the aforesaid proposed order is subject to § 4.22(c) of the Commission's Rules of Practice:

IT IS ORDERED that respondent may, within twenty (20) days after service upon it of this order, which has attached thereto the said Commission's decision, and findings as to the facts, conclusions and proposed order, file with the Commission its objections to any of the provisions of the proposed order, a statement of its reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision.

IT IS FURTHER ORDERED that counsel supporting the complaint may, within ten (10) days after service of such objections upon them, file a statement in reply thereto, supporting the proposed order.

By the Commission.

(Signed) JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

ISSUED: November 28, 1962

(SEAL)

FINDINGS AS TO THE FACTS, CONCLUSIONS
AND PROPOSED ORDER

(Number and Title Omitted)

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Pursuant to the provisions of an Act of Congress, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended

by the Robinson-Patman Act, approved June 19, 1936 (15 U.S.C., Sec. 13), the Federal Trade Commission on April 22, 1958, issued and subsequently served upon respondent its complaint in this proceeding, charging said respondent with violation of subsection (a) of Section 2 of the Clayton Act, as amended. Respondent's answer to the complaint was filed June 23, 1958. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. The hearing examiner, in his initial decision filed December 15, 1961, held that the acts and practices of the respondent, as found in his initial decision, were not in violation of the law as charged and he accordingly ordered the complaint dismissed. Counsel supporting the complaint and respondent have filed cross-appeals.

The Commission having considered said appeals and the briefs and oral argument in support thereof and in opposition thereto, and the entire record herein, and having granted the appeal of counsel supporting the complaint and denied the respondent's appeal, and having vacated and set aside the initial decision, now makes this its findings as to the facts, conclusions drawn therefrom and proposed order, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the said initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, The Borden Company, is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal office and

place of business located at 350 Madison Avenue, New York 17, New York.

2. The respondent is engaged in the manufacture, processing, distribution and sale of an extensive variety of food, dairy and chemical products in the United States and abroad. Its total sales in 1957 amounted to \$931,220,662.00. The only product with which we are here concerned is evaporated milk. Substantial quantities of this product have been shipped from respondent's various plants to purchasers thereof located in states other than the states of manufacture. In 1956, respondent's sales of evaporated milk exceeded \$30,000,000.00.

3. Respondent has been producing and selling Borden brand evaporated milk since 1892. The respondent's carload and pool-car delivered prices for Borden brand evaporated milk during the period of time included in the complaint were as follows:

January 1, 1956, to May 14, 1956	\$6.05 per case,	
	tall 48s;	
May 15, 1956, to March 29, 1957	6.30	Ditto;
March 30, 1957, to November 18, 1957	6.45	Ditto;
November 19, 1957, to March 31, 1958	6.60	Ditto.

The less-than-carload prices throughout this period of time were 5c higher per case of tall 48s. The terms of sale have included a cash discount of 2% if paid within 10 days after sale, and a swell allowance of 1/10 of 1% to cover damaged goods sold to retail buyers. Such sales of Borden brand evaporated milk were made principally to wholesalers or jobbers, and to chain stores.

4. In about 1938, the respondent began packing its evaporated milk under the private labels of the purchasers as well as under its own Borden brand. During the period of time with which we are concerned, January 1, 1956, to March 31, 1958, the prices of such milk were determined by a pricing formula applicable to all of respondent's private label customers. This formula included the cost of the buyer's label, the cost of hauling the milk from the dairy farm to respondent's plant, the average monthly cost of the milk, and, finally, a factor referred to as "COTM", or "Cost Other Than Milk", which included the cost of additives such as Vitamin D, the cost of cans, the plant processing, overhead cost, and a gross margin or profit factor. The respondent's private label prices determined in accordance with the foregoing formula, sometimes referred to as the "Cost plus pricing formula", were net f.o.b. plant. No cash or other discount was allowed the purchaser of private label milk, and all purchasers buying from the sale plant at or about the same time paid the same price. These prices, however, varied from one to another of respondent's plants, and from month to month in conformance with the changing price of milk paid to the farmers. A further factor of variation was respondent's periodic revision of its gross margin of profit, which was reviewed approximately every six months, and adjusted to the changing conditions of respondent's general operation.

5. In the course and conduct of its aforesaid business, respondent has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

6. The evidence shows that there was no difference in the physical composition or quality of the evaporated milk

sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices. Respondent's evaporated milk, regardless of how it was labeled or at what price it may have been sold, either at respondent's plant or in the market place, was milk of "like grade and quality" within the meaning of Section 2(a) of the Clayton Act, as amended.

7. Numerous invoices in the record showing sales to different customers disclose that during the period of time included in the complaint, the f.o.b. price of respondent's private label evaporated milk at its various plants was consistently and substantially lower than the delivered price of respondent's Borden brand evaporated milk. The transactions evidenced by these invoices occurred at one or another of respondent's nine plants, located, respectively, at Fort Scott, Kansas; Wellsboro, Pennsylvania; Modesto, California; Albany, Oregon; Dixon, Illinois; New London, Wisconsin; Perrinton, Michigan; Lewisburg, Tennessee; and Chester, South Carolina. The prices of Borden brand and private label brand evaporated milk prevailing at two of respondent's plants during the time involved illustrate the differences in price, as follows:

Chester, South Carolina, Plant

	<i>Delivered price, Borden brand milk</i>	<i>F.o.b. price, private-label milk</i>
1957		
June	\$ 6.45 per case	\$ 4.8942 per case
July	6.45 per case	4.9051 per case
August	6.45 per case	4.9210 per case
September	6.45 per case	4.8660 per case
October	6.45 per case	4.8166 per case
November	6.45 per case	4.9361 per case
December	6.60 per case	4.9741 per case
1958		
January	\$ 6.60 per case	\$ 5.0227 per case
February	6.60 per case	5.0289 per case
March	6.60 per case	4.9436 per case

Lewisburg, Tennessee, Plant

	<i>Delivered price, Borden brand milk</i>	<i>F.o.b. price, private-label milk</i>
1956		
August	\$ 6.30 per case	\$ 4.7363 per case
September	6.30 per case	4.81988 per case
September	6.30 per case	4.8321 per case
October	6.30 per case	4.7718 per case
October	6.30 per case	4.8418 per case
November	6.30 per case	4.7411 per case
November	6.30 per case	4.8211 per case
November	6.30 per case	4.8311 per case
1957		
January	\$ 6.30 per case	\$ 4.9837 per case
January	6.30 per case	5.0737 per case
February	6.30 per case	5.0478 per case
February	6.30 per case	4.9628 per case
February	6.30 per case	5.0578 per case
March	6.30 per case	4.9766 per case

March	6.30 per case	4.8966 per case
March	6.30 per case	4.9666 per case
March	6.30 per case	4.9866 per case
March	6.30 per case	5.0566 per case
April	6.45 per case	4.8742 per case
April	6.45 per case	4.9542 per case
May	6.45 per case	4.8389 per case
May	6.45 per case	4.9189 per case
June	6.45 per case	4.8749 per case
July	6.45 per case	4.9232 per case
July	6.45 per case	4.8332 per case
August	6.45 per case	4.8327 per case
September	6.45 per case	4.8744 per case
October	6.45 per case	4.9738 per case
November	6.45 per case	4.966 per case
December	6.60 per case	4.999 per case

1953

January	\$ 6.60 per case	\$ 5.0273 per case
February	6.60 per case	5.0072 per case
March	6.60 per case	4.9436 per case
March	6.60 per case	4.9188 per case

The record shows that these differentials are not accounted for by differences in the cost of transportation arising from the f.o.b. deliveries and the destination deliveries.

8. It is found that respondent, while engaged in commerce and in the course of such commerce, discriminated in price between different purchasers of commodities of like grade and quality.

9. Representatives of seven relatively small canners of

evaporated milk located in the Midwest testified in support of the complaint. Although each of these seven milk canners sold evaporated milk both under their own labels and under private labels, by far the larger percentage of their evaporated milk business consisted of the sale of private label milk. None of them advertised or sold their product on a national level, and all of them sold their private label evaporated milk, with minor exceptions, on a delivered-price basis. These companies all competed with respondent in the sale of evaporated milk. These and other Midwestern competitors will sometimes hereinafter be referred to as the Midwest competitors.

10. These testifying Midwest competitors and their plant locations are as follows:

Company and Plant Locations

- Page Milk Company, Merrell, Wisconsin, and Coffeyville, Kansas (Page)
- United Dairy Company, Barnesville, Lodi and Waterford, Ohio (United)
- Westerville Creamery Company, Covington, Ohio (Westerville)
- Gehl Guernsey Farms, Germantown, Wisconsin (Gehl)
- Dairyland Cooperative Association, Juneau, Wisconsin (Dairyland)
- Defiance Milk Products Company, Defiance, Ohio (Defiance)
- Nashville Milk Company, Nashville, Ohio, a wholly owned subsidiary of Defiance (Nashville)

11. Sales volumes on a tall can basis for the testifying Midwest competitors individually and for the respondent for the years 1955-1957 were as follows:

<i>Packer</i>	1955	1956	1957
Page	720,884	726,443	735,803
United	887,651	1,041,041	958,373
Westerville	701,847	593,739	589,242
Gehl	108,924	168,479	285,544
Dairyland	25,766	49,404	None*
Defiance	739,886	699,953	694,166
Nashville	132,863	150,645	158,811
Respondent	5,235,852	5,010,205	5,419,108

*Discontinued evaporated-milk production in April 1957.

United States Department of Agriculture Dairy Statistics in the record show supply and distribution (which approximates total commercial sales) of canned evaporated milk in the United States as follows:

(In Millions of Pounds)

1950 — 2,720	1954 — 2,362
1951 — 2,456	1955 — 2,297
1952 — 2,406	1956 — 2,257
1953 — 2,407	1957 — 2,204

On the basis of 43 1/2 pounds to the tall case, the total sales volumes in tall cases for the most recent three years of those mentioned were: 1955 — 52,804,598; 1956 — 51,862,069; 1957 — 50,666,667.

12. The record also reveals that in recent years a number of companies have gone out of the evaporated milk business. The concerns which have discontinued the production of evaporated milk since 1950 include the following:

Dairyland Cooperative Association (Dairyland Cooperative), Juneau, Wisconsin (discontinued April 1957).

Amboy Milk Company, Amboy, Illinois (discontinued early in 1958).

Dean Milk Company (discontinued 1955 or 1956).

Fort Dodge Creamery Company.

Rochester Dairy Company, Rochester, Minnesota (discontinued 1954 or 1955).

Hillpoint Creamery Company, Reedsburg, Wisconsin.

Dairyland Distributors Cooperative, Watertown, Wisconsin.

Producers Creamery, Springfield, Missouri (discontinued in 1956).

Reich McJunkin, Meadville, Pennsylvania.

Wilson Milk Company, Indianapolis, Indiana.

Also, between 1956 and 1958, Consolidated Badger Cooperative restricted its evaporated milk operation to Wisconsin and the upper part of Michigan. There have been no new concerns going into the evaporated milk business.

13. When respondent expanded its operations and sales in the private label evaporated milk field beginning about 1956, Midwest competitors began to lose customers and sales to respondent. In certain instances, sales were lost to

respondent indirectly. Some of the lost customers switching to respondent's private label evaporated milk made their purchases of the product through Biddle Purchasing Company, New York City, an organization which performs a buying service for wholesale grocers. A partial list of specific accounts lost includes:

<i>Competitors</i>	<i>Account Lost</i>
Page	Kembell Grocery Co., Fort Worth, Texas.
United	The Penn Fruit Co., Philadelphia, Pennsylvania; Brockton Public Markets, Brockton, Massachusetts.
Westerville	Colonial Stores, Thomasville, Georgia; Thomas & Howard Co., Columbia, South Carolina.
Gehl	General Retailer Owned Grocers, Chicago, Illinois; Dixie Home Stores, Greenville, South Carolina.
Dairyland	The Penn Fruit Co., Philadelphia, Pennsylvania; Klein's Supermarket, St. Paul, Minnesota.
Defiance	Central Retailer Owned Grocers, Chicago, Illinois; Colonial Stores, Raleigh, North Carolina.
Nashville	Central Retailer Owned Grocers, Chicago, Illinois; Colonial Stores, Thomasville, Georgia; Winn Dixie, Tampa, Florida, and others for various of the above competitors.

14. The full amounts of the losses by Midwest competitors to respondent can only be estimated based on the prior

purchases of each last account. By so doing, the estimated loss was at least 241,815 cases, and the actual loss may well have been higher. The sales losses were as follows for each testifying Midwest competitor:

<i>Competitor</i>	<i>Cases Lost to Respondent</i>
Page	3,650
United	14,168
Westerville	38,397
Gehl	25,434
Dairyland	22,320
Defiance	72,806
Nashville	65,040
Total	241,815

15. The loss of business was substantial, particularly for some of the competitors. For instance, Dairyland Cooperative, which subsequently discontinued evaporated milk production, lost the Topco Associates' account in 1956 to respondent. The total purchases through this account in 1956 were \$22,320. Dairyland Cooperative's total evaporated milk sales in 1956 were only 49,404 cases. The loss was about one-half its sales for the period. Witness DeMaster testified that Dairyland Cooperative's decline in sales and eventual discontinuance of business was due to the freight rate advantage of plants to the East. However, it was not until the time that respondent expanded in the private label field, applied its discriminatory prices and took a substantial share of the firm's business that it finally discontinued production of the product. Although other factors apparently were involved, the finding is that respondent's price

structure to a significant extent led to Dairyland's discontinuance.

16. The entry and expansion of respondent in the private label field and its pricing methods has put severe pressure on its Midwest competitors. Mr. Page, of Page Dairy Company, testified:

" . . . The entry of the Borden Company into the private label business and the manner in which they have been operating has placed a severe competitive pressure on the entire unadvertised brand of private label milk structure and that has, in my opinion, largely been felt in the way, as far as we are concerned, has largely been felt in the way of a lowered market price with which we must contend."

Mr. Anderson, of United Dairy Company, referred to the same situation in his testimony as follows:

"The competition has forced our prices down from the level we had previous to that and some of the competition has been selling on a different basis, on an f.o.b. basis and it is made highly competitive because of those factors."

17. Certain of the testifying competitors gained in sales volume in the period covered by the complaint. At least part of these increases, however, was obtained from other Midwest companies which had ceased operations. Witness Page, of Page Dairy Company, testified that he attributed the increase of his company principally to trade that had

previously been handled by Producers Creamery of Cabool, Missouri, which company went out of business. Witness Anderson, of United Dairy Company, testified that the increase of that company was accounted for by additional business received from former customers of Wilson Milk Company obtained when that company sold its evaporated milk business to Dean Milk Company, of Chicago. Witness Diehl, of Defiance Milk Products Co., testified that increases for both Defiance and Nashville Milk Company (a subsidiary) were in part due to business gained from evaporated milk plants that had gone out of business. To a considerable extent, therefore, the increases were mere windfalls and cannot be expected to reoccur on a regular basis. Sooner or later the full effect of respondent's discriminatory price structure can be expected to take its full toll.

18. It undoubtedly is a factor to be considered in this matter, although not a crucial one, that plants in the Midwest were disadvantaged as to the Eastern and Southeastern markets over plants located in the East and Southeast because of increased freight costs. Indicative of this is the difficulty which Dairyland Cooperative had in competing for markets in the East. However, there is no clear overall picture in the record as to the extent or the significance of possible freight advantages which respondent might have had over competitors. It is clear from the record, based on facts shown and the reasonable inferences to be drawn therefrom, that plant location advantage, if an element in the switching of customers to respondent, was only one of several considerations, and that another important element was the lower (discriminatory) prices on the private label product compared to Borden brand.

19. This record does not show a complete market picture for the evaporated milk industry, but it does develop the competitive situation as between respondent and the Midwest competitors. Respondent by comparison to these competitors is a large and powerful concern. It has broad resources in that it sells a wide variety of food products both at home and abroad. Moreover, its sales of evaporated milk are principally under Borden brand, whereas the testifying competitors generally indicated that their evaporated milk sales were mostly private label. In other words, the testifying competitors were considerably more dependent upon private label evaporated milk sales than the respondent.

20. Respondent's prestige and power in the market is illustrated by the fact that private label customers came to respondent seeking a source of supply. On the other hand, the Midwest competitors are small companies with relatively small sales volumes of evaporated milk compared to the sales of respondent. They maintain a rather precarious hold in the market place. As we have seen, sales for evaporated milk diminished in the period disclosed by the record. Since 1950, at least ten concerns, mostly in the Midwest, have discontinued production of evaporated milk. There are no new concerns coming into the business. Under such circumstances, little is needed to shift the competitive balance. Respondent came into the market using a discriminatory pricing structure. This has put a severe strain on the smaller competitors as some of them testified. In fact, the discontinuance of Dairyland Cooperative is tied to respondent's expansion in the field and its use of

discriminatory prices. The testifying Midwest competitors all lost accounts to the respondent and it appears that the shift of business has been permanent.

21. In this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely. This is enough to satisfy the injury requirement of the Act. We find and conclude that the effect of respondent's discriminatory pricing may be substantially to lessen or to injure, destroy or prevent competition with respondent, i.e., there is a likelihood or a reasonable probability of substantial competitive injury in the primary line.

22. There is also a showing in the record that the effect of the discrimination may be substantially to lessen or to injure, destroy or prevent competition with customers of the person who granted the discrimination. This would be competition with respondent's wholesale customers and with its retail customers. The differences in prices to customers, including competing customers, is well documented by the evidence. The following are examples:

<i>Customer</i>	<i>Date</i>	<i>Borden Brand Delivered Price</i>	<i>Private Label f.o.b. Price*</i>
Hartley Grocery Columbia, S. C. (wholesaler)	7/18/57	6.45	

Biddle Purchasing Co. at Thomas & Howard Columbia, S. C. (wholesaler)	7/18/57	4.9051 **
Rawl Distributing Co. Columbia, S. C. (wholesaler)	7/ 8/57	6.45
Rawl Distributing Co. Columbia, S. C.	3/ 4/58	6.60
Biddle Purchasing Co. at Thomas & Howard Columbia, S. C.	2/ 4/58	5.0289
Piggly Wiggly	1/10/58	5.0227
Carolina Co., Inc. Columbia, S. C. (chain retailer)	3/ 7/58	4.9436

• Prices do not include cost of labels.

**The purchase in this instance was made by Thomas & Howard, Chester, South Carolina, for Chester & Howard at Columbia, South Carolina, through the Biddle Purchasing Company. Biddle was paid \$5.04 per case and Thomas & Howard, Columbia, South Carolina, was billed by its affiliate at a \$.17 per case markup to cover cost of labels and handling for a total of \$5.21 per case.

23. The testimony from wholesalers as well as retailers disclosed the extremely low or nonexistent profit margins on evaporated milk. In most instances, wholesalers and retailers testified that evaporated milk was handled for ac-

commodation to customers and not for profit. In fact, evaporated milk is used as a loss leader which indicates that discriminatory prices made it difficult for the unfavored customers to compete not only because of higher prices on that item but because it would tend to draw away customers for other products as well. Wholesale and retail witnesses testified to the effect that a lower price from the producer, such as the price on respondent's private label goods, would have been of great value in improving profit margins and assisting in meeting the competition on this item. The following is illustrative of pertinent testimony on the subject:

Woodrow W. Power, Power Food Stores, Inc., Columbia, South Carolina (retailer) (R. 454):

"Q. Now, you mentioned a short while ago, Mr. Power, you are in competition with various other stores in your vicinity like Piggly Wiggly, A&P, Colonial and the like. Now, I assume that you follow their sales advertising policies and their merchandising policies?

"A. Yes.

"Q. Have you found them advertising private label milk at a price less than that charged by you for brand label?

"A. Yes.

"Q. Or for any evaporated milk which you handle?

"A. Yes.

"Q. Have you found that you could meet that price that is charged by them?

"A. No, sir, I can't buy it that cheap.

"Q. Well, if you were able to obtain the private label evaporated milk from Hartley or Merchants at a price say of \$5.25, \$5.30, would you be interested in it?

"A. Yes."

Daniel Shumpert, Shumpert Food Sales, West Columbia, South Carolina (retailer) (R. 473):

"Q. Why do you say a nickel or a dime would have been of help? In other words, any differential of a cost of a nickel or a dime for private label.

"A. It puts me in a position to meet competition prices more. The lower I can buy the cheaper I can sell it."

Harold A. McFeely, R. P. Turney & Company, Greer, South Carolina (wholesale grocery) (R. 563, 564):

"Q. Well, is the explanation you have just made, does it apply to the reason or the reason why you would have been interested in the private label evaporated milk? Just exactly why would the private label have been important to you?

"A. I sell government agencies, state and local county quite a bit of merchandise for their chain gang camps and prisons and I have never been able to get that business due to the fact that I had only advertised brands to quote on and in checking at the offices I find

that this milk under this label in one particular case has been getting the business for a year or so.

"Q. Do you remember the name on the label?

"A. I couldn't touch it. Yes, Red and White, put out by Thomas & Howard is a brand I see in Greenville now in the County Home and various different institutions and it is sold to them on the basis of what you said a few minutes ago, \$5.25 or \$5.30, this milk is sold at 25 to 30 cents a case profit and when I quoted \$6.60 I did not receive any business and I was out of line over a dollar per case. So if I had secured the business at \$6.60 it wouldn't have meant anything, but if I had had the private label milk I could have competed in the market and would have been able to get the business with that price."

24. It has been shown, in short, that some purchasers have paid less than their competitors for purchases of like goods from respondent and that the difference is, in the circumstances, substantial. We find and conclude, therefore, that the effect of respondent's price discrimination may be substantially to lessen or to injure, destroy or prevent competition with respondent's customers.

25. Respondent has submitted a cost study in an attempt to cost justify the price discrimination case shown pursuant to the cost proviso in Section 2(a). The finding is that respondent's cost study is inadequate and unacceptable primarily because of the broad averaging employed. It is also found that the alleged items of expense appear-

ing as "Investment Cost" and "Brokers' Commissions" were improperly listed as costs for the purpose of cost justification under the amended Clayton Act.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The acts and practices of the respondent, as herein found, violate subsection (a) of Section 2 of the Clayton Act, as amended.

PROPOSED ORDER

IT IS ORDERED that respondent The Borden Company, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality by selling to any purchaser at a price higher than the price charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

The term "price" as used in this order means the net price after all discounts, including cash discount, rebates or other allowances, including damaged goods allowance, have been deducted.

IT IS FURTHER ORDERED that respondent The Borden Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission, Commissioner Elman dissenting and Commissioners Anderson and Higginbotham not participating.

(Signed) JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

ISSUED: November 28, 1962

OPINION OF THE COMMISSION
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of

THE BORDEN COMPANY,
a corporation.

DOCKET NO. 7129

By Dixon, Commissioner:

Respondent has been charged with violating Section 2(a) of the Clayton Act, as amended, by discriminating in price between its customers buying evaporated milk under the Borden label and those buying such product under private label. The hearing examiner, in his initial decision filed December 15, 1961, held that no price discrimination in violation of the Act was established because there was no showing of substantially lessened competition or a reasonable probability of such danger to competition in the future. He further held that respondent had fully cost justified the price differences shown. The examiner dismissed the complaint.

Both parties have appealed. Counsel supporting the complaint challenges the holding that there was a failure to prove competitive injury as prescribed in the Act and from the holding that respondent had successfully cost justified the price differences. They request that respondent be found to be in violation of Section 2(a) and that an appropriate order to cease and desist be issued. Respondent, in its appeal, mainly contests the examiner's finding and conclusion that evaporated milk under its Borden's brand and private label are commodities "of like grade and quality".

The Borden Company is engaged in the manufacture and sale of a wide variety of food, dairy and chemical products in the United States and abroad. Its total sales in 1957 were \$931,220,662. The commodity involved in this proceeding is evaporated milk, a product made from whole fresh milk by processing, which includes evaporation, homogenization, and the addition of vitamins and certain minerals. Respondent manufactures and sells evaporated milk in commerce in substantial quantities. In 1954, its sales of the product exceeded \$30,000,000. Respondent's plants for producing evaporated milk during the period covered by the complaint were located at Fort Scott, Kansas; Wellsboro, Pennsylvania; Modesto, California; Albany, Oregon; Dixon, Illinois; New London, Wisconsin; Perrinton, Michigan; Lewisbury, Tennessee; and Chester, South Carolina.

Packers of evaporated milk consist of those who sell under nationally advertised brands, i.e., respondent, *Pet* Milk Company, and the Carnation Company; chain stores and their subsidiaries which pack only for their respective organizations under their own brands, e.g., The Kroger

Company; and the smaller packers who produce mainly under labels owned and controlled by their customers. Packers in this latter category in the Midwest, some of them testified in the proceeding, include:

Page Milk Company, Merrill, Wisconsin;
 United Dairy Company, Barnesville, Ohio;
 United Milk Company, Cleveland, Ohio;
 Defiance Milk Products Company, Defiance, Ohio;
 Westerville Creamery Company, Westerville, Ohio;
 Gehl Guernsey Farms, Milwaukee, Wisconsin;
 Edwardsville Milk Company, Edwardsville, Illinois;
 Consolidated Badger Cooperative, Shawano, Wisconsin.

These concerns were all in competition with Borden in the sale of evaporated milk in the period covered by the complaint. These and other packers in the Midwest will hereinafter sometimes be referred to as the Midwest competitors.

I. *"Like Grade and Quality"*

As an essential element in a Section 2(a) matter, there must be a showing that the commodities involved in the price discrimination are "of like grade and quality".¹ Respondent concedes in its brief that physically, at the point of manufacture, the two products (the Borden brand and

¹Section 2(a) reads in pertinent part:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . ."

the private label) were alike. It argues, however, that in the market place they were unlike, i.e., the one (Borden brand) could command a higher price than the other (private label), and, therefore, they were not of like grade and quality within the meaning of the statute.

The Commission in a number of prior proceedings has held that goods which are the same in all respects except labels are comparable goods for the purpose of Section 2, or goods of like grade and quality. In *The Goodyear Tire & Rubber Company*, 22 F.T.C. 232 (1936), reversed on other grounds 101 F. 2d 620 (6th Cir. 1939), a pre-Robinson-Patman Act proceeding, the Commission held, in effect, that corresponding grades of Sears, Roebuck & Co. private label tires and Goodyear's own brands of tires were comparable in grade and quality.² Under the Clayton Act, as amended by the Robinson-Patman Act, the Commission in *United States Rubber Co., et al.*, 28 F.T.C. 1489 (1939), a matter involving tires, and *United States Rubber Co.*, 46 F.T.C. 998 (1950), a matter involving canvas shoes, prohibited discriminatory price differentials between sellers' brands and customers' private labels. In these cases the Commission disregarded brand differences and found the products to be of like grade and quality. Similarly, in *Page Dairy Co.*, 50 F.T.C. 395 (1953), different label markings were held to be without significance. See also, the Trade Practice Rules for the Steel Bobby Pin and Steel Hair Pin Manufacturing Industry (1957) (Rule 11, Section II, Example

²Under old Clayton Act Section 2, the provision for price differentials reflecting differences in "grade" or "quality" was a defensive proviso. In the Act as amended, the provision "like grade and quality" was placed in the definitional text of the statute.

No. 4) in which, under the example, brand differences are disregarded.

There have been some court decisions as to the meaning of the phrase "like grade and quality", but these do not deal with the precise issue now before us, i.e., whether the label difference alone renders the goods unlike and outside the scope of the Act. The court cases include *Bruce's Juices, Inc. v. American Can Co.*, 87 F. Supp. 985, 987 (S.D. Fla. 1949), *aff'd* 187 F.2d 919, 924 (5th Cir. 1951), *modified* 190 F.2d 73 (5th Cir. 1951) (District Court upheld on holding the different sized cans were of like grade and quality); *Atalanta Trading Corp. v. Federal Trade Commission*, 25 F. 2d 365 (2nd Cir. 1958) (rejection of a broad "relevant market" test for determining "like grade and quality"); *Moog Industries, Inc. v. Federal Trade Commission*, 23 F.2d 43 (8th Cir. 1956), *reviewed on other grounds* 355 U.S. 411 (1958) (noninterchangeable items in a line or automotive parts sufficiently comparable for price regulation).

The legislative history leaves little doubt that Congress intended that brand distinctions be disregarded under the "like grade and quality" requirement. The Commission in *The Goodyear Tire & Rubber Company* case, *supra*, was noted in a Committee report.³ At one point in the con-

³H. Rep. No. 2287, 74th Cong., 2nd Sess. 4. The Report refers to the case as support for the view that the granting of preferences was not confined to any one line of industry or distribution. The Report states that the Commission found in the *Goodyear* case that "... at no time did it [Goodyear Tire & Rubber Co.] offer its own dealers prices on Goodyear brand of tires which were comparable to prices at which respondent was selling tires of equal and comparable quality to Sears, Roebuck & Co."

sideration of the legislation, there was a move to amend the bill by inserting "and brands" after the words "commodities of like grade and quality." This proposal was branded by the draftsman of the Patman bill, as "a specious suggestion that would destroy entirely the efficacy of the bill against large buyers."⁴ Congress could have required a distinction for brands. It did not.

Respondent, interestingly, does not contend in its argument, that all brand differences result in goods of unlike or different grade and quality. Clearly, the basic aims of the Act could be too easily thwarted if merely changing a label would nullify the application of the statute. Respondent argues, instead, that a distinction should be made between differing situations, as follows:

(a) the situation where the brand name is not shown to represent any significant added value being sold by the manufacturer, and

(b) the situation where, as is asserted in the present case, the manufacturer's well-known brand name has a very substantial and thoroughly demonstrated commercial significance.

Respondent has cited no controlling authority or persuasive support of any nature for such interpretation. We believe it to be more reasonable, considering the objectives of the legislation, to interpret the phrase so as not to exclude the application of the Act in cases where the only distinction

⁴Hearings Before a Subcommittee of the House Committee on the Judiciary, on Bills to Amend the Clayton Act, 74th Cong., 2nd Sess. 421, 469 (1936).

is in the label. In this connection, the Attorney General's Report had this to say in part:

"The majority of this Committee, however, recommends that the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test . . . [T]he Committee majority believes that abandonment of a physical test of grade and quality in favor of a marketing comparison of intrinsically identical goods might not only enmesh the administrators of the statute in complex economic investigations for every price discrimination charge, but also could encourage easy evasion of the statute through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute at differential prices . . ." (Report of the Attorney General's National Committee to Study the Anti-trust Laws, 158 (1955)).⁵

This we believe is a sound analysis. In our view, the discriminatory price transactions should first be subject to scrutiny under the statute; the market factors which may dictate that there will be different prices between the seller's brand and private label can then be considered in connection with the provisions of Section 2. For example,

⁵In *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43, 49 (8th Cir. 1956), the court adopted the statement in the Attorney General's Report at page 157 that "The like grade and quality concept . . . was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute."

if cost savings are involved, these can be raised in connection with a cost defense. Thus, economic factors may be considered, but the price relationship between different brands of intrinsically like goods remains subject to the terms of the statute.

We believe the examiner correctly decided this issue. The Borden brand and the private label evaporated milk are commodities of like grade and quality. Respondent's contention that the examiner erred in his holding on the question is rejected.

II. Price Discrimination

A price discrimination under Section 2 is merely a price difference. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). The examiner found a price discrimination within the meaning of the statute. Respondent appears to challenge this finding in its contention that no difference in comparable prices has been shown. Respondent claims that to make the prices comparable it is necessary to deduct from the Borden brand price, net of the delivery factor, the value of the Borden brand name, and that when this is done the Borden brand price is less than the private label price.

We have held that the products are of like grade and quality and, thus, the initial determination as to whether a mere difference in price exists is concerned only with whether respondent has charged a higher net price to one customer than it has charged another. The net price is the price after deducting discounts, rebates and allowances. In

this case, it is clear that there is such a price difference. The examiner was correct in his holding on the question.

III. *Competitive Effects*

The complaint charges that respondent's price discrimination resulted in prescribed adverse effects upon competition in several lines of commerce, including the line in which respondent is engaged (the primary line). We will first analyze the proof herein on the alleged competitive injury at the primary level.

It must be emphasized that Section 2(a) of the Clayton Act, as amended, which prohibits price discriminations whose "effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." does *not* require a finding that the discriminations in price *in fact* have an adverse effect on competition. *Corn Products Refining Co., et al. v. Federal Trade Commission*, 324 U.S. 726 (1945); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46 (1948). "The statute is designed to reach such discriminations 'in their incipiency' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co., supra*, at 738. Accordingly, it is not essential that the record show actual injury. We will consider this matter on the basis of whether there has been a showing that respondent's price discrimination may have, or will likely have, any adverse competitive effects.

The record reveals that the evaporated milk industry has suffered a decline in sales and that a large number of companies have in recent years gone out of this business. Market share data, as found by the examiner, shows the total industry sales volume (on tall case basis) as follows:

<i>Year</i>	<i>Cases Sold</i>
1955	52,804,598
1956	51,862,069
1957	50,666,667

The concerns which have discontinued the production of evaporated milk since 1950 include the following:

Dairyland Cooperative Association (Dairyland Cooperative), Juneau, Wisconsin (discontinued April 1957);

Amboy Milk Company, Amboy, Illinois (discontinued early in 1958);

Dean Milk Company (discontinued 1955 or 1956);
Fort Dodge Creamery Company;

Rochester Dairy Company, Rochester, Minnesota
(discontinued 1954 or 1955);

Hillpoint Creamery Company, Reedsburg, Wisconsin;

Dairyland Distributors Cooperative, Watertown, Wisconsin;

Producers Creamery, Springfield, Missouri (discontinued in 1956);

Reich McJunkin, Meadville, Pennsylvania;

Wilson Milk Company, Indianapolis, Indiana.

Also, between 1956 and 1958, Consolidated Badger Cooperative restricted its evaporated milk operation to Wisconsin and the upper part of Michigan. The record shows that there have been no new concerns going into the evaporated milk business.

The 1957 sales volumes of the Midwest competitors who testified in this proceeding were as follows:

<i>Company</i>	<i>1957 Sales Volume (Tall Case Basis)</i>
Page Milk Company	735,803
United Dairy Company	958,373
Westerville Creamery Company	589,242
Gehl Guernsey Farms	285,544
Defiance Milk Products Company	694,166
Nashville Milk Company	158,811
Dairyland Cooperative	(discontinued in 1956)

By way of comparison, the sales volume of respondent (tall case basis) for 1957 was 5,419,108.

The facts concerning respondent's expansion into the private label evaporated milk field and the impact upon the Midwest competitors (as reflected by specific losses of

accounts to respondent) is not in any substantial dispute. About July 1955, Producers Creamery of Springfield, Missouri, discontinued the sale of private label evaporated milk and three of its customers, Topco Associates, Central Retailer-Owner Grocers, and Hills Stores Company, thereafter arranged with respondent to supply them with such milk. Respondent subsequently expanded its private label operations to plants previously producing only Borden label and also began serving other additional accounts.

As a direct consequence, Midwest competitors lost accounts and sales to respondent.⁶ The number of cases lost cannot be figured exactly because it is impossible to know with certainty how much a given account would have purchased. However, based on purchases for the prior twelve months when such accounts were customers, some estimate of the lost sales can be made. Respondent has figured the total loss to be 241,815 cases, a figure which the examiner accepted. Counsel supporting the complaint claims a higher loss figure of about 287,000 cases. The figures in either case do not show the full impact of respondent's pricing practices on competition because they reflect only the initial losses. The fact is that these were not just temporary losses. Arrangements with buying organizations, such as Topco Associates, were of a long-term nature to supply all or a large part of the purchaser's needs. For all practical purposes, the accounts were lost permanently.

⁶In certain instances sales were lost to respondent indirectly. Some of the lost customers switching to respondent's private label evaporated milk made their purchases of this product through Biddle Purchasing Company, of New York City, an organization which performs a buying service for wholesale grocers.

Using data which respondent apparently does not dispute, the sales losses for individual Midwest competitors were as follows for the period covered by the complaint:

<i>Competitor</i>	<i>Cases Lost to Respondent</i>
Page	3,650
United	14,168
Westerville	38,397
Gehl	25,434
Dairyland	22,320
Defiance	72,806
Nashville	65,040
	<hr/> 241,815

Examples of specific accounts lost are as follows:

<i>Competitors</i>	<i>Accounts Lost</i>
Page	Kimbell Grocery Co., Fort Worth, Texas;
United	The Penn Fruit Co., Philadelphia, Pennsylvania; Brockton Public Markets, Brockton, Massachusetts;
Westerville	Colonial Stores, Thomasville, Georgia; Thomas & Howard Co., Columbia, South Carolina;
Gehl	Central Retailer Owned Grocers, Chicago, Illinois; Dixie Home Stores, Greenville, South Carolina;

- | | |
|-----------|---|
| Dairyland | The Penn Fruit Co., Philadelphia, Pennsylvania; Klein's Supermarket, St. Paul, Minnesota; |
| Defiance | Central Retailer Owned Grocers, Chicago, Illinois; Colonial Stores, Raleigh, North Carolina; |
| Nashville | Central Retailer Owned Grocers, Chicago, Illinois; Colonial Stores, Thomasville, Georgia; Winn Dixie, Tampa, Florida. |

Thus, the immediate effect of respondent's expansion into the private label evaporated milk area was to attract accounts away from competitors. Such lost accounts were large and important purchasers. The loss of business was substantial, particularly for certain of the competitors. For instance, Dairyland Cooperative, which subsequently discontinued evaporated milk production, lost the Topco Associates' account in 1956 to respondent. The total purchases by this account in 1956 were \$22,320, while Dairyland Cooperative's total evaporated milk sales in 1956 were only 49,404 cases. The loss was about one-half its sales for the period.

Witness DeMaster testified that the reason for Dairyland Cooperative's decline in sales and eventual discontinuance of business was the freight rate advantage of plants to the East. However, it was not until the time that respondent expanded in the private label field, applied its discriminatory prices and took a substantial share of the firm's business that it finally discontinued production of the product. Although other factors apparently were involved, we be-

lieve that the record supports a finding that respondent's price structure to an important extent led to Dairyland Cooperative's discontinuance.

The entry and expansion of respondent in the private label field and its pricing methods has put severe pressure on its Midwest competitors. Mr. Page, of Page Dairy Company, testified:

"... The entry of the Borden Company into the private label business and the manner in which they have been operating has placed a severe competitive pressure on the entire unadvertised brand of private label milk structure and that has, in my opinion, largely been felt in the way, as far as we are concerned, has largely been felt in the way of a lowered market price with which we must contend."

Mr. Anderson, of United Dairy Company, referred to the same situation in his testimony as follows:

"The competition has forced our prices down from the level we had previous to that and some of the competition has been selling on a different basis, on an f.o.b. basis and it is made highly competitive because of those factors."

Respondent, in denying that its pricing practices have injured competition, points especially to the fact that certain of the testifying competitors gained in sales volume in the period covered by the complaint. At least part of these increases was obtained from other Midwest companies

which had ceased operations. Witness Page, of Page Milk Company, testified that he attributed the increase of his company principally to trade that had previously been handled by Producers Creamery of Cabool, Missouri, which company went out of business. Witness Anderson, of United Dairy Company, testified that the increase of that company was accounted for by additional business from former customers of Wilson Milk Company obtained when that company sold its evaporated milk business to Dean Milk Company, in Chicago. Witness Diehl, of Defiance Milk Products Company, testified that increases for both Defiance and Nashville Milk Company (a subsidiary) were in part due to business gained from evaporated milk plants that had gone out of business. To a considerable extent, therefore, the increases were mere windfalls and cannot be expected to reoccur on a regular basis. Sooner or later the full effect of respondent's discriminatory price structure can be expected to take its full toll.

It undoubtedly is a factor to be considered in this matter, although not a crucial one, that plants in the Midwest were disadvantaged as to the Eastern and Southeastern markets over plants located in the East and Southeast because of increased freight costs. Indicative of this is the difficulty which Dairyland Cooperative had in competing for markets in the East. The examiner, it is noted, placed considerable stress on respondent's asserted freight advantage as a factor in his finding of a lack of competitive injury. On this subject, the examiner found that as to 86% of the sales gained by respondent from the Midwest competitors, respondent had a clear freight advantage over these competitors due to more convenient plant locations.

The inference which the examiner seems to draw is that it was the freight advantage which enabled respondent to capture accounts from Midwest competitors, not the price discrimination. There is no good record support for any such finding or inference. The instances cited by the examiner are isolated examples and there is no clear over-all picture in the record as to the extent or the significance of possible freight advantages which respondent might have had over competitors. We note that even the examiner does not attempt to explain all the losses as being due to plant location advantage. Moreover, it is clear from the record based on facts shown and the reasonable inferences to be drawn therefrom, that plant location advantage, if an element in the switching of customers, was only one of several considerations, and that another important element was the lower (discriminatory) prices on the private label products compared to Borden brand. In any event, we are here concerned more with the losses which may subsequently occur and clearly, respondent with its discriminatory price structure has an effective device to obtain accounts from its smaller competitors.

This record does not show a complete market picture for the evaporated milk industry, but it does sufficiently develop the competitive situation as between respondent and the Midwest competitors. Respondent by comparison to these competitors is a large and powerful concern. It has broad resources in that it sells a wide variety of food products both at home and abroad. Moreover, its sales of evaporated milk are principally under Borden brand, whereas the testifying competitors generally indicated that their evaporated milk sales were mostly private label. In other words, the testifying competitors were considerably more

dependent upon private label evaporated milk sales than the respondent.

Respondent's prestige and power in the market is illustrated by the fact, as the examiner found, that private label customers came to respondent seeking a source of supply.

On the other hand, the Midwest competitors are small companies with relatively small sales volumes of evaporated milk compared to the sales of respondent. They maintain a rather precarious hold in the market place. As we have seen, sales for evaporated milk diminished in the period disclosed by the record. Since 1950, at least ten concerns, mostly in the Midwest, have discontinued production of evaporated milk. There are no new concerns coming into the business.

Under such circumstances, little is needed to shift the competitive balance. Respondent came into the market using a discriminatory pricing structure. This has put a severe strain on the smaller competitors as some of them testified. In fact, the discontinuance of Dairyland Cooperative is tied to respondent's expansion in the field and its use of discriminatory prices. The testifying Midwest competitors all lost accounts to the respondent and it appears that the shift of business has been permanent.

In this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely. This is enough to satisfy the injury requirement of the Act.

We conclude that the effect of respondent's discriminatory pricing may be substantially to lessen or to injure, destroy or prevent competition with respondent, i.e., there is a likelihood of substantial competitive injury in the primary line.

There is also a showing in the record that the effect of the discrimination may be to lessen or to injure, destroy or prevent competition with customers of the person who granted the discrimination. This would be competition with respondent's wholesale customers and with its retail customers. In *Federal Trade Commission v. Morton Salt Co.*, *supra*, it was sufficient to justify a finding of the prescriptive effect that some merchants had to pay more for like goods than their competitors.

Here the differences in prices to customers, including competing customers, is well documented by the evidence. The following are examples:

Customer	Date	Borden Brand Delivered Price	Private Label f.o.b. Price
Hartley Grocery Columbia, S. C. (wholesaler)	7/18/57	6.45	
Biddle Purchasing Co. at Thomas & Howard Columbia, S. C. (wholesaler)	7/18/57		4.905

Rawl Distributing Co. Columbia, S. C. (wholesaler)	7/ 8/57	6.45
Rawl Distributing Co. Columbia, S. C.	3/ 4/58	6.60
Biddle Purchasing Co. at Thomas & Howard Columbia, S. C.	2/ 4/58	5.0289
Figgly Wiggly	1/10/58	5.0227
Carolina Co., Inc. Columbia, S. C. (chain retailer)	3/ 7/58	4.9436

(*The record shows that in July 1957, Thomas & Howard of Chester, South Carolina, the purchasing affiliate of the Thomas & Howard organization, on one order paid Biddle Purchasing Co. \$5.04 per case and billed the order to Thomas & Howard of Columbia, South Carolina, at a \$17 per case markup to cover cost of labels and handling for a total of \$5.21 per case.)

The testimony from wholesalers as well as retailers disclosed the extremely low or nonexistent profit margins on evaporated milk. In most instances, wholesalers and retailers testified that evaporated milk was handled for accommodation to customers and not for profit. In fact, evaporated milk is used as a loss leader which indicates that discriminatory prices made it difficult for the unfavored customers to compete not only because of higher prices on that item but because it would tend to draw away customers for other products as well. Wholesale and retail witnesses tes-

tified to the effect that a lower price from the producer, such as the price on respondent's private label goods, would have been of great value in improving profit margins and assisting in meeting the competition on this item. The following is illustrative of pertinent testimony on the subject:

Woodrow W. Power, Power Food Store, Inc., Columbia, South Carolina (retailer):

"Q. Now, you mentioned a short while ago, Mr. Power, you are in competition with various other stores in your vicinity like Pigley Wigley, A&P, Colonial and the like. Now, I assume that you follow their sales advertising policies and their merchandising policies?

"A. Yes.

"Q. Have you found them advertising private label milk at a price less than that charged by you for brand label?

"A. Yes.

"Q. Or for any evaporated milk which you handle?

"A. Yes.

"Q. Have you found that you could meet that price that is charged by them?

"A. No, sir, I can't buy it that cheap.

"Q. Well, if you were able to obtain the private label evaporated milk from Hartley or Merchants at a price say of \$5.25, \$5.30, would you be interested in it?

"A. Yes."

Daniel Shumpert, Shumpert Food Sales, West Columbia, South Carolina (retailer):

"Q. Why do you say a nickel or a dime would have been of help? In other words, any differential of a cost of a nickel or a dime for private label.

"A. It puts me in a position to meet competition prices more. The lower I can buy the cheaper I can sell it."

Harold A. McFeely, R. P. Turney & Company, Greer, South Carolina (wholesale grocery):

"Q. Well, is the explanation you have just made, does it apply to the reason or the reason why you would have been interested in the private label evaporated milk? Just exactly why would the private label have been important to you?

"A. I sell government agencies, state and local county quite a bit of merchandise for their chain gang camps and prisons and I have never been able to get that business due to the fact that I had only advertised brands to quote on and in checking at the offices I find that this milk under this label in one particular case has been getting the business for a year or so.

"Q. Do you remember the name on the label?

"A. I couldn't touch it. Yes, Red and White, put out by Thomas & Howard is a brand I see in Greenville now in the County Home and vari-

ous different institutions and it is sold to them on the basis of what you said a few minutes ago, \$5.25 or \$5.30, this milk is sold at 25 to 30 cents a case profit and when I quoted \$6.60 I did not receive any business and I was out of line over a dollar per case. So if I had secured the business at \$6.60 it wouldn't have meant anything, but if I had had the private label milk I could have competed in the market and would have been able to get the business with that price."

It has been shown, in short, that some purchasers have paid less than their competitors for purchases of like goods from respondent and that the difference is, in the circumstances, substantial. We conclude, therefore, that the effect of respondent's price discrimination may be substantially to lessen or to injure, destroy or prevent competition with respondent's customers.

We hold that the examiner erred in his determination that the record failed to show competitive injury as prescribed under Section 2(a) of the amended Clayton Act.

IV. *Cost Justification Defense*

Respondent has sought to cost justify the price discrimination at issue in this proceeding.⁷ It has introduced into

⁷The proviso in Section 2(a) relating to cost justification reads: "Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:"

the record a cost study which the examiner, after some modification, has accepted as full justification for the challenged differences in price.

A summary of respondent's cost study as it appears in the initial decision is as follows:

Respondent's Cost Analysis

1957

Average Per Case

	<i>Borden Brand</i>	<i>Private Label</i>	<i>Difference</i>
Gross Sales	\$6.4046	\$5.1743	\$1.2303
Less Sales Deductions:			
Damaged Goods .....	.0112	.0027	.0085
Cash Discount Offered .....	.1279	—	.1279
Net Sales	\$6.2655	\$5.1716	\$1.0939
Costs:			
Labels and Cartons	\$.1789	\$.1376	\$.0413
Primary Freight .....	.3684	.0188	.3496
Secondary Freight .....	.0112	—	.0112
Reserve Storage .....	.0690	—	.0690
Consignment Storage .....	.0305	—	.0305
Investment Cost .....	.0972	.0568	.0404
Premium Label Redemption .....	.2316	—	.2316
Advertising .....	.1247	—	.1247
Sales Department .....	.3163	.0009	.3154
Brokers' Commissions .....	.0427	—	.0427
Promotion Department .....	.0189	.0123	.0066
Clerical .....	.0151	.0062	.0089
Total	\$1.5045	\$.2326	\$1.2719

Difference in Cost	\$1.2719
Difference in Price	\$1.0939

Excess of cost difference
over price difference = \$.1780

The figure on this table which respondent seeks to cost justify is the average price difference per case of \$1.0939. For the year 1957, this is the difference between the average price per case for Borden brand of \$6.2655 and the average price per case for private label of \$5.1716. The total cost figures shown on the table are the average cost per case for the Borden brand and the average cost per case for the private label for 1957. The average cost difference shown by the study is \$1.2719, which exceeds the average price difference of \$1.0939 by .1780.

This study is inadequate and unacceptable because of the use of broad averaging. In addition, respondent has listed certain items as expense items which cannot properly be used for cost justification under the Robinson-Patman Act.

Broad averaging in the study has resulted in distortions in prices as well as costs. The price discrimination charged in this proceeding is concerned with various particular markets and specific transactions. For instance, in the plant area of Chester, South Carolina, in 1957, while Borden brand purchasers such as Rawl Distributing Company, Columbia, South Carolina, and Associated Grocers Mutual of Carolina, Charlotte, North Carolina, were paying prices at different times of \$6.45 and \$6.60 per case, private label purchasers, with whom the Borden brand purchasers or their customers competed, were paying the lower prices

such as \$4.8942 per case in June, \$4.9051 per case in July, \$4.9210 in August, and so on. The price competition which the Borden brand customers faced was not the average private label price for 1957 of \$5.1716 but rather the lower actual prices above mentioned. The use of broad averages may show an apparent justification on the average, but it levels the extremes and ignores specific markets or transactions where the greater differences may result in the lessening of competition.

Not all averaging is objectionable. For instance, in *Sylvania Electric Products, Inc., et al.*, 51 F.T.C. 282 (1954), the Commission, in connection with radio receiving tubes, approved a cost study which compared the aggregate price difference with the aggregate cost difference on the entire complement of tubes sold by the respondent. In that case, the lack of uniformity in the price spread was held to be of no competitive significance. That is not the case here. The competitive significance is illustrated by the above example involving the plant area of Chester, South Carolina.

A question of averaging costs for customer classes was recently considered by the Supreme Court of the United States in *United States v. Borden Co.*, 370 U.S. 460 (1962). There the court accepted the principle that some grouping is permissible in connection with cost justification under the proviso in Section 2(a). It further stated, however, that this is not to say that price differentials can be justified on the basis of arbitrary classifications or even classifications which are representative of the numerical majority of the individual members. The court said: "A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the aver-

aging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific member." (Footnote omitted.) *United States v. Borden Co.*, *supra*, at 469; cf. *Champion Spark Plug Co.*, 50 F.T.C. 30, 43 (1953); *Standard Oil Company*, 41 F.T.C. 263, 276-277 (1945), *reversed* on other grounds, 233 F. 2d 649 (7th Cir. 1956); *International Salt Co., et al.*, 49 F.T.C. 138, 153-155; *Thompson Products, Inc.*, 55 F.T.C. 1252, 1264 (1959); Advisory Committee on Cost Justification Report to the Federal Trade Commission (F.T.C. Mimeo. 8, 1956).

In the *Borden* case, the court rejected the cost defense because of the failure of the appellee to show sufficient homogeneity in the classifications. The cost defense in this proceeding is defective for a like reason. Respondent failed to use any customer classification in its study despite the fact that it sells to a wide variety of customer groups, e.g., chain retailers, wholesalers, cooperatives and other subgroups, among which its costs differed.

An example would be the differences in selling expenses between jobbers and retailers. Salesmen calling on jobbers were described by one witness as largely order takers. This is in contrast to the many promotional services performed by salesmen calling on retailers.

To take another example, the difference claimed for Sales Department expense between Borden brand and private label is \$.3163, a figure which alone considerably exceeds the claimed excess justification of \$.1780. However, these expenses were not the same for all customers. There were three distinct groups so far as the Sales Department expense was concerned: those where no salesmen called

(e.g., small stores doing under \$200,000 annually); stores where salesmen's activities were restricted (some chains would not allow salesmen to do any stock arranging); and those where the salesmen performed the full range of in-store service activities such as building floor displays and arranging the stock.

For the Sales Department expense, therefore, the costs, if any, were incurred in different amounts for the different groups of customers, and the use of an average figure created a substantial distortion in the cost study. Average cost figures were likewise used for such items as labels, storage and freight, and, as to these, it appears that such costs would vary among different customers. Accordingly, it was incorrect for the purpose of the cost study to average all such costs together without distinctions as to the customer groups.

Respondent's cost study fails for other reasons. For instance, it claims an "Investment Cost" difference of \$.0404 per case. Respondent apparently kept larger inventories of Borden brand evaporated milk than of the private label. In its analysis, it concludes that the money invested at 8% resulted in an inventory cost of \$.0835 per case for Borden brand and an inventory cost of \$.0257 per case for private label.^a The fallacy in this position is that the so-called "Investment Cost" is not an actual, incurred cost at all; it amounts to a return on capital investment. Accordingly,

^aThe cost analysis set forth above refers to "Investment Costs" of \$.0972 and \$.0568 for Borden brand and private label, respectively. These figures include claimed additional amounts for investment in accounts receivable. The figures for investment in inventories alone are \$.0835 for Borden brand and \$.0257 for private label.

this item is rejected for cost justification purposes. Cf. *Thompson Products, Inc.*, 55 F.T.C. 1252, 1265-1266 (1959).

Another item of cost claimed by respondent is the brokers' commission. This item is also rejected. In our view a savings in cost resulting from the elimination of brokers' commissions are not allowable cost savings under Section 2(a). Cf. *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166, 171 N. 18 (1960).

We conclude that respondent's cost analysis is inadequate to cost justify its discriminatory prices and that the examiner erred in his conclusion that respondent had shown full cost justification.

The hearing examiner erred in dismissing the complaint. The record fully supports a finding of price discrimination in violation of Section 2(a) of the Clayton Act, as amended, and an order to cease and desist the practice should be entered. It is necessary, therefore, to consider the form of such cease and desist order.

V. Form of Order

While this matter involves primary line injury to competition (as well as injury to competition with respondent's customers), it was not a geographic price difference which resulted in such injury. Rather, it was the different prices quoted for the like products sold under the Borden brand and under private label without regard to geography. Thus, the type of order which would regulate the relationship of prices geographically does not appear to be necessary in this case to correct the violation found. To put it another

way, the price discrimination found is not the result of differences in price which may exist between plant locations such as those in the South and those in the Midwest. It results from the price discriminations occurring between brands in each market where private label is sold in competition with Borden brand. To eliminate such price discrimination so far as it is not justified will put the Midwest competitors on an equal competitive footing in regard to the sale of private label. An effective order to prevent such price discrimination between Borden brand and private label customers will remove the cause of the adverse competitive effects in the primary line as found herein. It will also prevent the injury to competition in the lines of commerce in which respondent's customers are engaged. In the circumstances of this case, we do not believe it necessary to enter an order of any broader scope.

There are readily recognizable actual cost differences between Borden brand and private label which will justify differences in price. We have previously outlined the principles to be employed in determining the differences which may be so justified. It will be necessary for respondent, if it chooses to rely on cost justification, to first classify its customers in groups of reasonable homogeneity and to base its differences in price on the cost savings for each such group.

The prohibition we will enter in this case will order respondent in connection with the sale of food products in commerce to cease and desist from discriminating in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with

the purchaser paying the higher prices or with a customer of the purchaser paying the higher prices.

Respondent's appeal is denied and the appeal of counsel supporting the complaint is granted. The initial decision of the hearing examiner is vacated and set aside and we are issuing our own findings, conclusions and proposed order to cease and desist in lieu thereof.

Commissioner Elman dissented to the decision herein and Commissioners Anderson and Higginbotham did not participate in the decision herein.

November 28, 1962

Before the Federal Trade Commission

In the Matter of:

The Borden Company,
a Corporation

Docket No. 7129

Room 511-A
United States Court House
Foley Square
New York, New York

* * * *

PROCEEDINGS

* * * *

[109] A. J. BERRY, JR., was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hays:

Q State your full name, sir.

A Andrew Jefferson Berry, Jr.

Q What is your address, sir?

A RFD 1, Armonk, New York.

Q Where are you employed, sir?

A The Borden Company.

Q In what capacity?

A I am product merchandising manager.

Q Of what products, sir?

A Seven products, specifically, to date.

Q What are they, sir?

A Evaporated milk, condensed milk, chocolate malted [110] milk, instant hot chocolate, chocolate syrup, — how many is that? Have I missed one?

Starlac powdered skimmed milk.

Q How long have you been employed in that capacity, Mr. Berry?

A The capacity I just named for about two, three months, sir.

Q And prior to that time, what position did you hold, sir?

A I was product merchandising manager in charge of evaporated milk only.

Q How long did you hold that position?

A Approximately seven years.

* * * *

[114] Q When did Borden first start canning evaporated milk under a private label?

A I couldn't give you the exact date, sir, but it was [115] some place around 1938.

Q 1938?

A Approximately.

Q How many customers did they have, sir, in 1938 of private label evaporated milk?

A I could just answer you generally insofar as I know, one, but there could have been more. I don't know.

Q You became the person in charge of evaporated milk sales some seven years ago; is that correct?

A Yes, sir. It was approximately 1951. I don't remember the date exactly.

Q How many private label customers did the Borden Company have in 1951 when you became head of that division?

A As far as I recall, there was one.

Q What was the name of that company?

A Safeway.

Q Is that the Hanford Milk Company?

A That is the name actually, Hanford Milk Company, division of Safeway Stores.

* * * *

[118] Q When did you, in January 1st, 1956, from then on, when did you start obtaining customers other than Safeway which **[119]** were east of the Rocky Mountains?

A Well, I don't remember specifically, the specific dates, but I would say it was around the middle of the year.

Q Did you have anything to do with the obtaining of these customers?

A Yes, sir.

Q What customers were they?

A As I recall, it was the Topco in Chicago. Also what is known as CROG, Central Retail-Owned Grocers. Also the Hill Grocery Company.

Q What did you have to do with the obtaining of these customers?

A Evaporated milk is under my control and direc-

tion and it fell upon me to — I was the one that worked out the arrangements with these customers.

* * * *

【120】 Q (Interposing) Did you receive any instructions with reference to obtaining new private label evaporated milk customers?

A No, sir. There was no instructions that I was to obtain new ones.

Q Did you obtain the new customers that you referred to on your own? Did you just go out and get them?

A No, sir.

Q What activated the solicitation of these people?

A I didn't solicit for customers. The customers came to us and asked us if we would handle the business for them.

Q And you took it on?

A Yes, sir.

Q In other words, you didn't generally solicit the trade of all the people that might be interested in buying private label evaporated milk?

【121】 A I did no soliciting whatsoever.

Q Specific ones came to you?

A That is correct.

Q There was no general offer by the Borden Company to can private label evaporated milk?

A Not at that time, no, sir.

Q With reference to Borden label canned evaporated milk during the period January 1st, 1956, through March 31, 1958, I take it that was sold on an f.o.b. — on a delivered price basis?

A That's correct.

Q What delivered prices were in effect during that period?

A That period was again what, sir?

Q January 1, 1956, through March 31, 1958.

A As I recall, and I don't want to misquote here — January 1st, 1956. Let me go backwards now because — as I recall, a price increase occurred in May of '56. I think this is right. At that time, the price was \$6.30. I believe that's the right date. Then in March 30, 1957, there was another price change and it became \$6.45. I believe the last price change occurred in November 19, 1957, and it became \$6.60. I believe those dates are correct.

Q If I understood your testimony correctly, you said that May, 1956, the price was increased to \$6.30?

A Yes, sir. I believe that's right.

* * * *

[122] Q Now, you have quoted prices \$6.30. Is that a price per case?

A Yes, sir.

Q Will you describe the size and the number of cans in that price case?

A Well, that particular case I referred to is what we know as a tall-sized case, it has a tall sized can, 48 tall-sized evaporated milk cans in that case.

[123] Q How many ounces per can, fourteen and a half, sir?

A Fourteen and a half ounces, thirteen fluid ounces.

* * * *

[124] Q With reference to y o u r sale of Borden-brand evaporated milk, as I understand it, it's sold on a delivered price basis, is that correct?

A That's correct, sir.

Q How far does that delivered price take the commodity?

A I assume — well, it takes it to the customer's warehouse siding, railroad track or to the customer's warehouse.

Q It takes it to the customer's warehouse?

A That's right.

* * * *

[125] Q With reference to private label evaporated milk, that was sold on a difference basis, is that correct, sir?

A Yes, sir.

[126] Q What basis was that sold on?

A F.O.B.

Q F.O.B. plant.

Now, how far did that carry?

A F.O.B. plant.

Q Just right to the plant, not to a railroad or anything? It had the price from the door of the plant to the customer's store was paid by the customer, is that correct?

A That's correct.

* * * *

[127] Q Now, the price in effect in May of 1956 was \$6.30 a case, is that right, sir?

A At May 15 — yes, that's right. \$6.30. That's carload price.

* * * *

Q You had other prices in effect on that date, is that correct?

A Yes, sir.

Q Will you tell me what those prices were to and the changes?

A There are two prices in the evaporated milk business. There is a carload price and what is known as an LCL carload price, or less than carload price.

Q The price changes that you gave, that is, May, 1956, the price went up to \$6.30 a case. That's the carload price and the pool car price, is that correct, sir?

A Yes.

Q Now, you have another price which is an LCL price?

A Yes.

Q And you haven't given that yet, have you?

A No.

Q What is that?

[128] A That's five cents higher than the carload price.

Q Is that true all during this period, the LCL price has always been five cents a case higher than the carload or pool car price?

A That's correct.

* * * *

[129] Q How was Borden brand sold? Through brokers or direct to retailers?

A I am not s u r e I understand you exactly right now.

Q I mean, name the classifications of customers that you had and how each classification was sold.

A Well, generally speaking t h e r e are two main classes of customers. They fall in direct account classification. One is a wholesaler, or a jobber, of which there is several different types, and the other one is a local or a regional or a national chain.

Q These per case prices that you have just given us, were they the prices to the jobber and to the chain?

A That's right.

Q The chain got the same price as the jobber?

A Anybody that bought at the carload price, yes. Anybody that bought at the LCL price, yes.

Q How are jobbers s o l d? Do you have salesmen that go around and sell them?

A In some areas we h a v e our own wholesale or salesman or job- [130] bing man who goes around taking orders for Borden's products for those jobbers. In other areas those services are performed by brokers.

Q I see.

You do have brokers?

A Yes, sir.

Q Selling Borden brand?

A Taking orders for Borden brand, that's right.

Q Are they paid by the Borden Company?

A Yes, sir.

Q How much were they paid during this period?

A Are you — they sell a lot of Borden products. Are you specifically referring to evaporated milk?

Q Yes.

A The normal brokerage is five cents a case. Tall-size basis.

* * * *

【131】 Q And the brokers would sell to whom, chain stores and —

A (Interposing) Chain headquarters and the jobbing trade. The broker performs a wholesale selling function.

* * * *

Q Was brokerage paid on private-label sales?

A Yes.

Q In all instances of private-label sales during this period?

A As far as I know.

Q How much was that brokerage?

A Two and a half cents a case, tall-size basis.

* * * *

【132】 Q During this period with reference to Borden label, did you ever give any discounts or rebates off the prices which you quoted, other than the cash discount and the swell allowance?

A No, sir.

Q With reference to the private-label sales during the period January 1, 1956, to March 31, 1958, did you ever give any rebates or discounts?

A No, sir.

Q As I understand it, the Borden Company former-

ly had an evaporated milk plant at Perrinton, Michigan?

A That's right.

Q How long was that plant operated?

A How long did it operate?

[133] Q Yes.

A I couldn't answer that, sir. I don't know.

Q Did it close down?

A Yes, sir.

Q When did it close down?

A Well, again I couldn't give you the exact date. I would say roughly — about a year ago. It might have been a little bit more. I am not sure.

Q As I understand it, Borden Company also has evaporated milk plants all during this period at Albany, Oregon; Modesto, California; Ft. Scott, Kansas; Dixon, Illinois; New London, Wisconsin; Wellsboro, Pennsylvania; Lewisburg, Tennessee; and Chester, South Carolina; is that correct?

A That's right.

* * * *

[134] Q Do all of the plants that I have named and which appear in the complaint, do they can both Borden brand and private label evaporated milk?

A During this period?

Q Yes, sir.

A I think the answer to that would be true, yes.

* * * *

[136] Q Have your sales of Borden brand evaporated milk since January 1st, 1956, increased, decreased or remained the same?

A They have tended downward.

* * * *

[137] Q In other words, there has been a definite shift of consumer preference away from evaporated milk?

A I would have to say that the answer to that would probably be yes in that the population is going up but the sales are not, they are turning down.

Q In other words, the sales not only are turning downward from the point of view of actual cases sold, but they are not holding their relative position considering the increase in population?

A I think that would be a true statement.

[138] Q During the period January 1, 1956, to March 31, 1958, have your sales of private-label evaporated milk increased, decreased or remained the same?

A During that period the total sales have increased.

* * * *

[154] Q What does that mean?

A That means that — let me get this straight. That means that the difference between the amount that the customer, CROG has paid on the invoice price, and the plant cost, plus the freight, or, in other words, the total cost of a shipment to them, the difference be-

tween those two is held as a credit because it's their money.

Q I didn't follow it. Will you explain it again?

A At the time shipment is made, we invoice that particular shipper, Central Retailer Owned Grocers and they pay that invoice.

Q I see.

A The total plant cost, plus the freight, which is for their account, gives them a total cost for that particular shipment and the difference between the amount they have paid on the issue of the invoice and this amount is a credit in their favor.

Q In other words, the invoices sent to CROG do not reflect the actual price they pay?

A Not the end price, no.

[155] Q But Commission Exhibit for identification 2097 does indicate the actual price in the total cost column?

A I would assume so, yes, sir. If that's what it is purported to be, I naturally assume that is correct.

Q That's what it is intended to reflect, isn't it?

A That's correct.

Q Total cost is supposed to indicate the actual price paid by CROG on the particular shipment?

A It's the actual cost of that particular shipment, that's right.

Q And the figure in the accrued credit column indicates an amount that they have overpaid and is due back to them?

A That is correct.

Q Is your description with reference to this one particular exhibit we have been discussing, that is, Commission Exhibit 2097, is that true of Commission

Exhibits for identification 2098 through 2115, except that the most on each of the exhibits is different?

A Yes. Each of those settlement sheets is a similar document.

* * * *

[156] Q I hand you Commission Exhibit 2116, Mr. Berry, and ask you to examine it and state what it is?

A That is an accounting statement for the Hanford Milk Company covering shipments made for their account in January, 1956.

* * * *

[157] Q The column headed "Total Cost," what does that refer to?

A That is the total cost of each of those sizes or cases of milk at that particular plant location. Total cost to Hanford.

* * * *

[181] AFTERNOON SESSION
2:00 p. m.

HEARING EXAMINER LIPSCOMB:

The hearing will come to order.

MR. HAYS:

Mr. Berry, will you resume on the stand?

ANDREW JEFFERSON BERRY, JR., resumed the stand and testified further as follows:

MR. HAYS:

Your Honor, I have one more document to be marked for identification. Commission Exhibit 2172. It shows the case volume of Borden label evaporated milk sales for the years 1956 and 1957.

(Document referred to was marked Commission's Exhibit 2172 for identification.)

MR. HAYS:

Is that correct, Mr. Wood?

MR. WOOD:

Yes.

MR. HAYS:

I offer this document in evidence.

HEARING EXAMINER LIPSCOMB:

By agreement, I assume between counsel, it may be received in evidence.

* * * *

【184】 Q I am going to show you Commission Exhibit 1085, which is a Borden invoice that relates to a sale to the Biddle Purchasing Company.

Now, I think I am correct, am I not, when I say that this invoice reflects the fact that it was sold to the **【185】** Biddle Purchasing Company and it was shipped to Thomas and Howard Company of Salisbury, North Carolina, is that correct?

A Yes. The shipment according to this invoice was to Thomas and Howard. Sold to Biddle Purchasing Company.

Q Biddle was one of the three customers you referred to as having taken on in 1956?

A I don't recall referring to Biddle in connection with taking them on in 1956, no.

Q When did you take them on?

A To the best of my knowledge, it was in 1957.

* * * *

[187] Q Have you had an opportunity to examine or did you take any part in the assembling of the invoices which have been identified as Commission Exhibits 459 through 2081? Would you like to see them?

A Yes, please.

I personally didn't assemble these. The original invoices were made up by the appropriate departments in the Borden Company.

[188] Q Do those exhibits reflect all the private label evaporated milk sales during the period January 1st, 1956, to March 31, 1958, with the exception of sales to Safeway and CROG?

A I am not sure I can answer that, Mr. Hays. I would assume these exhibits purport to represent all those sales, that that would be true.

Q In other words, that was what you intended to do when these exhibits were assembled, is that correct?

A Whatever we were asked for, as I recall, we assembled.

* * * *

[191] Q With reference to Commission Exhibit 211 which is a summary sheet, January, 1956, for Safeway — Hanford at that time, column, "Net Amount Paid

Is that the total amount paid by Safeway for t
evaporated milk reflected on this chart?

A Yes, sir.

Q Did they receive any rebates?

A No, sir.

* * * *

[197] GEORGE B. PAGE was thereupon called a witness for the Commission and, having been fi
duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hays:

Q State your full name, sir.

A George B. Page.

Q What is your address, sir?

A Merrill, Wisconsin.

Q You are here in response to a subpoena, sir?

A I am.

Q Do you have that subpoena here with you, sir?

MR. HAYS:

Let the record show the witness is handing me subpoena.

Q State what business you are in, sir.

A The Page Milk Company of Merrill, Wisconsin

Q How long have you been in that business?

A I have b e e n in the business approximately 33 years full time.

Q Are you president of that company?

A I am.

【198】 Q And you have been president for how long, sir?

A Oh, roughly 13, 14 years.

Q How long has the company been selling evaporated milk?

A Since late '20's.

Q Will you describe the type of operations that the company is engaged in?

A Well, we are in the business of buying fluid milk from the farmers and converting it into evaporated milk, selling the evaporated milk to the usual distributors, wholesale grocers, supermarket operators, chain stores and the like. We sell east of the Rocky Mountains. We don't go west.

Q Where do you have your evaporated milk plants?

A We have two plants. One at Merrill, Wisconsin, and one at Coffeyville, Kansas.

Q What type of customers did you sell private label evaporated milk to — did you sell your evaporated milk to in the last three years?

A We sell to the wholesale grocer and the chain store and supermarkets.

Q And that's a private label operation, sir?

A Very largely private label. Wide percentage.

Q Do you have any other type of evaporated milk operation, other than private label sales?

A We sell some under our own label, yes. Under labels of our own.

[199] Q You have been in the evaporated milk business 33 years, sir?

A That's right.

Q On the basis of your experience for the past 33 years, are you familiar with the industry?

A I believe I am, yes.

Q Can you describe the type of producers of evaporated milk that the industry is composed of?

A By "type" I presume you mean grouping, that's normally referred to as advertised brands and independents and the like of that.

Q Yes, sir.

A The industry rather naturally is divided up into, you might say t h r e e groups. The advertised brand packers of which the Carnation, Pet and Borden are the principal packers. The small independent packers and then the t h i r d group are subsidiaries of chain stores and members — parts of packing house organizations and so forth.

Q Can you describe the type of operation in private label evaporated milk that the chain stores have?

A Well, of course, the chain stores largely sell only their own organization, packed for their own organization, under their own label and though there are some occasional sales f r o m chain store packers to other packers.

Q Has there been any historic differential between the price of private label evaporated milk and branded evaporated **[200]** milk?

A Yes. There has been a differential between the so-called advertised brands of milk and the private label milk. It's obvious that w h e r e the advertised brand milk is moved to the consumer by virtue of the

so-called consumer franchise purchased through advertising, that the unadvertised brand is largely put through to the consumer by a lower price to the trade.

* * * *

[202] Q Since 1950 what has been the historic differential between the branded products and the private label products?

A Well, obviously, it has varied and starting at the time of the World War, why, there was a period that there was no differential.

But after that differentials have varied on what you might call a normal condition to up from 10 to 50, 60 cents.

There have been times w h e n it might have gone slightly beyond that under special circumstances, but that would be about the range under reasonably normal competitive conditions, sir.

Q Are you familiar with the members of the third category that you referred to, the private label evaporated milk canners, that is, members of that group?

A Enumerate who they are?

Q Yes. If you know them.

A I can enumerate some of them at least.

Without referring to those west of the Rocky Mountains, I would have to confine myself to the East, at the present time in the — in that particular grouping there are the United Dairy Company with headquarters in Barnesville, Ohio.

The United Milk Company, whose headquarters are at **[203]** Cleveland, Ohio.

The Defiance Milk Company at Defiance, Ohio.

The Westerville Creamery Company with their office at Westerville, Ohio.

The Gehl Golden Guernsey at Milwaukee, Wisconsin.

The Consolidated Badger Cooperative at Shawano, Wisconsin.

And ourselves. There is a very small amount packed by Edwardsville Creamery Company of Edwardsville, Illinois. That a b o u t covers it, although Armour & Company in the packer group do a little private label business, too.

* * * *

Q Have any concerns s i n c e 1950 gone out of the evaporated milk business, private label?

A There have been a substantial number who have gone out of the evaporated milk business.

* * * *

[205] Q Can you name the companies t h a t have gone out of business since 1950?

A I can name some of them. I will do the best I can.

There have been, starting more recently possibly would be the easiest way. The Amboy Milk Company of Amboy, Illinois, early this year.

[206] The Consolidated Badger at Shawano restricted their operation almost entirely to the State of Wisconsin and upper Michigan within the last two years, dropping out of the rest of the area.

The Dean Milk Company has a private label operation discontinued in the last two or three years.

The Fort Dodge Creamery Company went out of the evaporated milk business within the last couple of years.

About three or four years ago the Rochester Dairy Company at Rochester, Minnesota discontinued.

The Hillpoint Creamery Company at Reedsburg, Wisconsin.

Going back somewhat further, the Dairyland Cooperative — the Dairy Distributors' Cooperative at Wauwatertown, Wisconsin.

Coming back closer to the current date, in 1956 I believe it was, the Producers' Creamery of Springfield or Cabool — Springfield, Missouri, or their milk operation was at Cabool, but it was operated out of Springfield, discontinued.

There have been one or two more that just at the moment I can't think of.

Q Since January 1st, 1956, have you been in competition with the Borden Company in the sale of private label evaporated milk?

A Yes. The Borden Company have been in the private label business and we, naturally, we are in competition with all [207] that are selling in the private label field. If that is your point — I believe it is.

Q Did you bring with you a tabulation of the firms that ceased doing business with you since January 1st, 1956, sir?

A Yes. We have had three firms with whom we were doing business who have gone to the Borden Company.

MR. HAYS:

May I mark this for identification, your Honor, as Commission's Exhibit 2173?

HEARING EXAMINER LIPSCOMB:

It may be marked.

(The paper referred to was marked Commission's Exhibit 2173 for identification.)

THE WITNESS:

That is the tabulation.

By Mr. Hays:

Q Will you name the companies that stopped doing business with you during this period?

A The three involved were the Kimbell Company with headquarters at Fort Worth.

The M. System Stores at San Angelo, Texas, and the Winn-Dixie Hill Stores at New Orleans, Louisiana.

* * * *

【203】 Q I hand you Commission's Exhibit for identification 2173-A, 2173-B, and ask you to examine them and tell me what they are and how they were prepared?

A Well, at 2173-A is a listing of invoices of sales to the Kimbell houses at Albuquerque, Santa Fe and Las Vegas, New Mexico.

The 2173-B is to the Kimbell houses, invoices to Fort

Worth, Amarillo and to Sweetwater, Texas. Those were prepared by reference to our sales records and invoices.

Q Do they show — what time period do they cover?

A They cover a period of approximately one year prior to our last sale to the concern.

Q When was your last sale to the Kimbell Grocery Company, sir?

A February 3, 1958.

* * * *

[210] Q Mr. Page, I hand you Commission's Exhibit 2174 for identification. I ask you to tell me how it was prepared and what it represents?

A This represents a tabulation of our sales to the M. System Stores from June 15, 1957, through March 12, 1958, prepared in identical manner with the others.

Q And the headings —

A The tabulations are the same as the others.

Q And the columns refer to the same as Commission Exhibit 2173-A and 2173-B?

A That's right.

Q You no longer sell to the M. System Food Stores?

A We do not.

Q Do you know what happened to that customer?

A Yes. We were asked to send our labels to the Borden Company.

* * * *

[211] By Mr. Hays:

I hand you Commission's Exhibit for identification

2175, Mr. Page, and ask you to examine it and state how it was prepared and what it represents.

A This represents a tabulation of sales to Winn-Dixie Hill during the period June 22, 1957 through June 24, 1958.

The tabulations or — and columns are identical as on the previous exhibits and prepared in the same manner.

Q You no longer sell Winn-Dixie Hill private label evaporated milk?

A We do not.

Q Do you know what happened — who now sells Winn-Dixie Hill?

A Well, we have reason to believe that the Borden Company is.

* * * *

[213] Q I notice from this, the figures that you have just read off that your sales have increased generally over this period, that is, particularly since — slightly since 1955, is that correct?

A That's right.

Q To what do you attribute this increase in sales?

A Well, of course, there is a number of things but principally to the fact that in our case in 1956 the Producers Creamery of Cabool, Missouri went out of business and there was some trade from that — that that organization had previously been handling which we were able to acquire.

In the meantime also, in answer to a previous question, there have been quite a number of other private label independent packers go out of business and dur-

ing that period there have been some accounts become open for new suppliers and we have been able to acquire some of those accounts.

* * * *

[215] Q As president of the P a g e Milk Company and as an independent businessman engaged in the sale of private label evaporated milk, has your company felt any change as a result — any change in competitive conditions as a r e s u l t of the Borden Company's sales of private label evaporated milk since January 1st, 1956?

MR. WOOD:

I think that also is objectionable, Mr. Examiner. It is a case of broad characterizations.

If there are facts as to what the Borden Company has done, we would make no objection at all.

For example, we did not object when evidence was offered as to customers that apparently turned from Mr. Page's company to the Borden Company.

That sort of fact, of course, is something that a witness can properly testify to, but to say that changes have taken place due to something or other that the Borden Company has done is simply to bring into this record conclusions which is the ultimate function of the Examiner and the Commission to reach and not the function of a witness to state.

HEARING EXAMINER LIPSCOMB:

I think on the basis of his experience he may voice an opinion. How valuable that opinion would be, I don't

know. It would depend upon all the other facts in the case.

[216] If he has an opinion, he may give it.

A I definitely have an opinion, of course.

The entry of the Borden Company into the private label business and the manner in which they have been operating has placed a severe competitive pressure on the entire unadvertised brand of private label milk structure and that has, in my opinion, largely been felt in the way, as far as we are concerned, has largely been felt in the way of a lowered market price with which we must contend.

Q Do you sell your private label evaporated milk on an FOB plant basis?

A We do not. We sell delivered.

Q Are you familiar with the pricing of Borden private label evaporated milk as alleged in the complaint in this case?

A I am, as set forth in the complaint, yes.

Q As of July, 1957, where did your company sell private label evaporated milk; anywhere east of the Rockies?

A In a good share of the states east of the Rocky Mountains, yes.

Q Did it sell in South Carolina?

A We sold very little in the Southeast area. Our sales largely, that is, the volume sales, were west of the Mississippi and in the metropolitan East, although we do ship into the Southeast.

Q Are you familiar with the Borden Company's Dixon, **[217]** Illinois, plant?

A I am, yes, sir.

Q Did you, in July 1957, feel that your company could meet a price, FOB price, of \$5.25 a case?

A FOB plant price?

Q Yes, sir.

A No. We would not meet such a price. We will not meet such a price structure.

Q Why not?

A We don't feel it is a sound method of merchandising evaporated milk.

Q Is it unprofitable?

A Most definitely — well, it is a question.

We don't operate at that location. You are referring to that location?

Q Yes, sir.

A We don't operate at that location, and I wouldn't want to say.

As far as we are concerned, it would not have been a profitable operation for us to operate from that location.

* * * *

[222]

CROSS EXAMINATION

By Mr. Wood:

Q Mr. Page, I first want to clear up what I believe is a point that — in the record — that might give rise to some confusion.

Do you recall that yesterday you described three different groups in the evaporated milk industry.

A Yes.

Q And the first group was the advertised brand packers. The second group were the, what you re-

ferred to as the small independent packers and the third group were the chain stores or subsidiaries of chain stores who packed for their own sale.

Do you recall that testimony?

A Yes, I do.

Q Then later, according to the transcript, you were asked to name concerns in the third group, that is to say, the chain store people who pack for themselves, and you proceeded to name your company and the Defiance Company and Westerville [223] and some others.

A If that is the case —

Q (Interposing) You were referring to the second group when you listed those companies?

A Yes, sir.

Q In order to make the record clear —

A If that is the way the record shows, I did make an error in that respect.

Q Well, it is just the sort of thing we ought to clear up.

I am referring to the listing beginning at the bottom of page 202 of the transcript and running over onto 203. Those are on the second group as you had classified them?

A Yes, the second group as I originally classified them, that's right.

Q Now, will you give us the names of the companies that you know of that are in the third group, that is, the chain stores which either directly or through subsidiaries produce their own private label evaporated milk.

A Well, there is the White House Milk Company, a subsidiary of A & P. The American Stores Dairies,

a subsidiary of American Stores.

The Evangeline Milk Company, a subsidiary of First National.

Kroeger. I believe t h e y just run as the Kroeger [224] Company.

And then there is, of course, on the west coast, the Safeway organization which had the Lucerne and Hanford Milk Companies, a series of companies there. Brockway. They are all involved in their own milk production operation.

Q You are referring to evaporated milk?

A Yes. I believe that is under their Brockway, but I am not sure which one of those subsidiaries it is under. They have operations on the west coast.

Q But at any rate, A & P and First National Stores, Kroeger, American Stores and Safeway, either directly or through subsidiaries, produce all or a part of the evaporated milk which they sell in their stores?

A Yes.

Q As to those companies other than Safeway, is it your impression that they produce substantially all the evaporated milk they sell in their stores?

A In their own individual plants, produce all that they sell, all the milk?

Q Yes.

A Just under their private label.

Q Under their private label?

A Yes.

Q You have told us that your company sells its private label evaporated milk on a delivered price basis, is that [225] correct?

A That's right.

Q So far as you know, is that the general practice

among the packers of private label milk in group 2, as you described it in your testimony?

A Yes. So far as I know, that is the general practice.

Q And I gather from your testimony of yesterday that you think selling private label evaporated milk on an f.o.b. plant basis, is unsound, is that correct?

A That is my opinion. Yes, sir.

Q Now, the effect of a delivered price system is that the customers of a particular company pay the same price even though they may be at varying distances from the producer, is that the way it works?

A That's right.

Q And it is your view that the sounder system is to have the private label producers operate on that basis so that they — there will not be any geographical advantage accruing to particular producers because of plant location?

A That's my opinion. Yes.

* * * *

[226] Q Under your pricing system are your prices the same at a given time for the products that come from both the Merrill plant and the Coffeyville plant?

A Not necessarily. Depending upon the competitive conditions in the areas.

Q Do you mean t h e r e may be times when your prices generally out of Coffeyville are different from your prices generally out of Merrill?

A That is true at times.

Q Do you use any zone pricing formula in computing your prices?

A That is done to a very slight extent. Actually, for some time we have had what you might call depressed prices in the east particularly resulting in lower prices in the east than we had west of the Mississippi and that has resulted in zones.

[227] Q Do you have defined zones with price differentials between them or do you simply adapt your prices from time to time to market conditions?

A We do at times have to adapt to market conditions, certainly.

* * * *

[231] Q In addition to the private label evaporated milk that you sell, you also sell some under your own brand, do you not?

A We do, sir.

Q Is there a price difference between your own brand and the private label you pack?

[232] A No. We sell at the same price.

* * * *

[248] Q This attrition that you speak of among the wholesaler grocers began quite a number of years ago, didn't it?

A Yes.

Q After a time that attrition was followed, was it not, by the development of what you might call a new type of wholesale grocer who operated on a much, over a much larger area, a much larger volume and a much narrower spread; is **[249]** that true?

A It may not necessarily follow. It may have been

coincident with or about the same time — there has been tremendous changes in the grocery business.

Q But that development I speak of has happened?

A Yes, that's right.

Q And also there has been the development of the large retail outlets, the supermarkets and chain stores, the food stores, isn't that correct?

A That's correct.

Q The question I wanted to — the information I wanted to get from you was simply this: whether this development of the new style wholesaler with the large operation over a substantial area, and smaller margins, and also the development of these retail outlets of the kind I mentioned, has been accompanied by increasing interest on the part of such distributors, both wholesaler and retailer, in having their own private label?

A To a degree, that has been the case.

Q That has been true of all kinds of food. It is not just evaporated milk?

A Yes.

* * * *

[253] Q I have just one more question.

You told us yesterday that during World War II there was no or substantially no differential between the advertised brands of evaporated milk and the unadvertised brands. That since the war there had been normally a differential, which I believe you said ranged from ten cents to fifty to sixty cents and perhaps somewhat higher in some instance.

Is that correct?

A I believe that's substantially correct.

Q Isn't it the fact that it's been some years that that differential was as low as ten cents?

A Yes, that's right.

* * * *

REDIRECT EXAMINATION

By Mr. Hays:

Q I believe you testified that the differential, it's been [254] some years that the differential has been ten cents between private label evaporated milk and the branded evaporated milk?

A Yes.

Q How long has it been since that differential was ten cents?

A I would say that that has been the case in the early days, shortly after the war. After World War II.

Q And as we approach the future from those days, the differential has become greater, is that correct?

A It has become somewhat greater, yes.

Q I am not speaking of a specific differential, but I am speaking of the historic differential between the two types of products.

A That's right.

* * * *

[262] Q Insofar as the development in recent years of the large buyers operating on small margins, do you regard them as a possible source of customers?

A Yes, we certainly do. Any buyer of evaporated

milk, large or small, close margin seller or otherwise is a prospective customer for us.

* * * *

[270] JACK D. ANDERSON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hays:

Q Will you state your full name, sir?

A Jack D. Anderson.

Q What is your home address?

A My residence?

Q Yes.

A St. Clairsville, Ohio.

Q Where are you employed?

A United Dairy Company, Barnesville, Ohio.

Q How long have you been employed there?

A 18 years.

Q What is your official position with that company?

A Vice President and General Manager.

Q How long have you held that position?

[271] A About four years.

Q What type of business is the United Dairy of Barnesville, Ohio, engaged in?

A Primarily evaporated milk and some powdered milk, skimmed milk and fluid bottled milk to a minor degree.

Q Where are the evaporated milk plants of that company located?

A In Barnesville, Lodi, Ohio, and Waterford, Ohio.

Q Where do you sell evaporated milk?

A In the geographical area?

Q Yes, sir.

A Primarily the northeastern states, from Ohio east and as far south as West Virginia and Virginia.

Q Do you have your own label for your evaporated milk?

A Yes.

Q Do you also do a private label business?

A That's right.

Q Are you familiar with the private label evaporated milk companies, that is, milk companies that can under private labels?

A Yes. Most of them.

Q Are you familiar with that industry during the period 1950 to the present?

A Yes.

Q During the period 1950 to the present was the number of [272] firms canning private label evaporated milk increased, decreased or remained the same?

A Decreased.

Q Do you know the names of any of the firms that have left the business during that period?

A Yes. Would you like to have the names?

Q Yes, sir. Please.

MR. WOOD:

For the record, may I — I note a similar objection to the one I made to testimony like this from the previous witness as to the time period.

MR. HAYS:

My opposition is the same.

HEARING EXAMINER LIPSCOMB:

The ruling is the same. You may proceed.

A Amboy Milk Products. Hillpoint Cooperative in Wisconsin. Dairyland Cooperative, Wisconsin. Rieck McJunkin, Meadville, Ohio — Meadville, Pa. Wilson Milk Company in Indianapolis. This is Fort Dodge Creamery in Fort Knox, Iowa. Producers Cooperative, I think that is the name of it, in Springfield, Mo. There may be others. I just don't recall.

* * * *

【275】 Q From the figures that you have just given, I take it that there has been an increase in your domestic sales from 1950 up to 1957, is that correct?

A Yes. That's right.

Q What is the reason for that increase?

A Well, as the figures will show, up to approximately 1954 they were holding their own or going down slightly. In '55, because the Wilson Milk Company sold their plants and facilities to Kraft Cheese and sold the evaporated milk business to Dean Milk in Chicago and Dean was unable to furnish all the requirements for that business, they contracted with us to furnish a substantial quantity of evaporated milk.

That accounts for the increase, plus the fact that when they went out of business, when Dean went out and took the facilities to furnish the Wilson Evaporated milk, they turned over or made it possible for us to pick up some additional private label business which they at one time were furnishing.

* * * *

[276] Q Mr. Anderson, I h a n d you Commission's Exhibit for identification 2176, and ask you to examine it and state what it is and how it was prepared. Just one moment and I will give Mr. Wood a copy.

The question is, what is that document and how was it prepared?

A This is a list of the customers and the amount of milk that we sold this particular firm in the year's time prior to the time that we know or have indication that they were getting their supply from a competitor.

Q Do I take it then that the name on the document, the customer named is a customer that you no longer sell?

A That's right.

* * * *

[278] Q From an examination of Commission Exhibit 2176, it appears that the date of invoice of the last sale to Morris Siegel occurred on December 19, 1957.

Is that correct?

A That's the last sale.

Q Do you have any information that indicates to which of your competitors Morris Siegel commenced purchasing private label evaporated milk?

A There is indication they are buying it from the Borden **[279]** Company.

Q What was the basis for that indication?

A Our communications, through our local broker and talking with the Morris Siegel people. I don't believe there is any labels shipped. I don't know whether our plant shipped labels to the Borden Company or not in that particular case.

MR. WOOD:

I move to strike that testimony on the ground that it's based entirely on hearsay. The point isn't important in this instance because Mr. Hays has already got invoices which show the extent of the business done by the Borden Company with Morris Siegel Company so that by making the objection, I am not seeking to interpose any obstacles in Mr. Hays' way, but I do think we ought not to start down the road in trying to make a record based on hearsay, so I move to strike the testimony.

* * * *

[282] HEARING EXAMINER LIPSCOMB:

The objection is sustained.

Q Mr. Anderson, I hand you Commission's Exhibit for identification 2177, and ask you to examine it and state what it indicates and how it was prepared?

A This customer of ours in Scranton, Pennsylvania, prepared from our invoices of the number of cases of evaporated milk we sold this firm in the 12 months previous to our losing the account to competition. It shows the date of invoice, the number of cases on that particular date and the amount of money invoiced them for the merchandise.

* * * *

[286] Q I take it Commission Exhibit 2177 indicates actual sales to Sanker & Williams Company prior to the last sale, that is, 3-11-58, is that correct?

A That's correct.

* * * *

[287] Q I hand you Commission Exhibit 2178 for identification, and ask you to examine it and state what it is and how it was prepared?

A This is one of our former customers, Liberal Markets, Dayton. The sales to this firm for the 12 months previous to the time we have indications of losing it to competition. It lists the date of shipment and invoice date, the amount — the number of cases and the dollars and cents of the invoice.

* * * *

[288] Q Are you familiar with Tusco Grocers, Inc. of Uhrichsville, Ohio?

A Yes, sir.

Q Are they a customer of yours?

A They were a customer.

Q Do you sell Tusco Grocers, Inc. canned evaporated milk at this time?

A No, sir.

Q You formerly did, sir?

A Yes, sir.

Q I hand you Commission Exhibit 2179, which I have just marked, and ask you to examine it and state what it is?

* * * *

[289] A The name of the former customers of ours. The date which we sold them evaporated milk and the amount, number of c a s e s and also the dollars and cents value. And indications of a plant from which it was shipped from.

* * * *

Q Are you familiar with the Star Markets of Dorchester, Massachusetts?

A Yes.

Q During the period January 1, 1956, to the present, at sometime during that time did you sell them canned evaporated private label milk?

A January, '56?

Q Yes, sir.

[290] A Yes, sir.

* * * *

[291] Q I hand you Commission's Exhibit for identification 2180 and ask you to examine it and state what it is and how it was prepared?

A This former customer of ours, the d a t e of invoice, number of cases shipped them and the amount of money of the invoice, sir.

* * * *

[292] MR. HAYS:

I have a document that I ask be marked for identification as Commission's Exhibit 2181 that relates to Supreme Markets.

(The paper referred to was marked Commission's Exhibit 2181 for identification.)

By Mr. Hays:

Q I hand you Commission's Exhibit for identification 2181 and ask you if it was not prepared in the same manner as Commission's Exhibits 2180 and the others that you have testified to here today?

A Yes, in the same manner.

Q I take it it is a summary of invoice shipments as indicated thereon to Supreme Markets?

A That's right.

* * * *

[293] Q Are you familiar with the George G. Shaw Company of Dorchester, Massachusetts?

A Yes, sir.

Q During the period January 1st, 1956 to March 31, 1958, did you sell them canned label evaporated milk?

A Yes, sir.

MR. HAYS:

I have a document that I ask be marked for identification as Commission's Exhibit 2182 that relates to the George C. Shaw Company.

(The paper referred to was marked Commission's Exhibit 2182 for identification.)

By Mr. Hays:

Q I hand you Commission's Exhibit for identification 2182 and ask you if it was not prepared in the same man-

ner as the previous Exhibit 2181 and relates to sales of George C. Shaw Company from 3-11-55 to 2-29-56?

A It was prepared in the same manner as previously.

* * * *

【295】 Q I hand you Commission's Exhibit for identification 2183 and ask you if that was not prepared in the same manner as the previous exhibits here particularly 2182, except that it relates to sales of the Brockton Public Markets?

A Prepared in the same manner.

* * * *

Q From an examination of Commission's Exhibit 2183 it appears that the date of the last invoice of sale to that company, Brockton Public Markets, was 6/11/1956.

Have you sold or shipped any private label evaporated milk since that date?

A None.

* * * *

【296】 MR. HAYS:

I have here a document that I ask be marked for identification as Commission's Exhibit 2184 that refers to Pick-N-Pay markets.

(The paper referred to was marked Commission's Exhibit 2184 for identification.)

By Mr. Hays:

Q I hand you Commission's Exhibit for identification 2184 and ask you if it isn't correct that it was prepared in the same manner as the previous exhibits except that it relates to Pick-N-Pay Supermarkets?

A Prepared in the same manner.

* * * *

Q From an examination of Commission's Exhibit 2184 it [297] appears that the date of invoice of the last shipment to Pick-N-Pay Supermarkets was on 4/3/1957.

Have you sold any private label evaporated milk to that company since that time?

A No, none.

* * * *

Q I show you Commission's Exhibit 2185 for identification and ask you if it was prepared in the same manner as the previous exhibits, No. 2184, except that it relates to sales to the Penn Fruit Company?

A Prepared in the same manner.

* * * *

[298] Q From an examination of Commission's Exhibit 2185 it appears that the date of invoice of the last shipment to the Penn Fruit Company, Inc. was 6/9/1956.

Have you sold any private label evaporated milk to that company since that date?

A No.

* * * *

[299] Q I hand you Commission's Exhibit 2186 and ask you if it was prepared in the same manner as the previous exhibits, except that it relates to Heart Food Stores, Inc.?

A Yes.

* * * *

Q From an examination of Commission's Exhibit 2186, it appears that the date of invoice of the last sale to Heart Food Stores, Inc. was 2/27/1956.

Since that date have you sold any private label evaporated milk to that company?

A None.

Q Are you familiar with Big Bear Stores Company of Columbus, Ohio?

A Yes.

Q During the period January 1st, 1956 to March 31st, 1958, **[300]** did you sell that company private label evaporated milk?

A Yes.

MR. HAYS:

I have a document that I ask be marked for identification as Commission's Exhibit 2187 that relates to Big Bear Stores Company.

(The paper referred to was marked Commission's Exhibit 2187 for identification.)

By Mr. Hays:

Q I hand you Commission's Exhibit for identifica-

tion 2187 and ask you if it is not correct that that was prepared in the same manner as the previous exhibits except that it relates to Big Bear Stores?

A That's right.

* * * *

Q Directing your attention to the sales which are reflected in Commission's Exhibit 2176 through 2187, in order to make the record absolutely clear I ask you if those sales relate [301] only to private label evaporated milk?

A That's right, they do.

Q With reference to the customers which are — previous customers, rather, of yours that are reflected in Commission's Exhibit 2176 through 2187, at any time did you ship any private labels of that company to the Borden Company?

A Yes. I did. We did.

Q You did, your company did ship those labels?

A That's right.

Q What of those former customers, which of their labels do you refer to; which companies?

A Well, there are several companies. Food Club Label; that is the name of the brand.

And that label is used by Big Bear Stores, Pick-N-Pay, Heart Stores, Penn Fruit, George Shaw Company, the Brockton Public Markets, Star Markets.

There is another one up in New England — I can't recall the name. It is in the exhibit. And the Liberal Markets, sir.

Q In other words, insofar as each of those companies were named, they had their own private label?

A That's right.

Q And you shipped your stock of those labels to the Borden Company?

A That's right.

[302] Q Now, in point of time when did that shipment to the Borden Company occur?

A As I recall, it was in the summer of 1956. As to what month, I don't have that information. I can get it.

* * * *

Q Since January 1st, 1956, have there been any changes in the competitive situation which confront your company, sir?

A Yes.

Q What changes have taken place?

A The competition has forced our prices down from the level we had previous to that and some of the competition has been selling on a different basis, on an F.O.B. basis and has made it highly competitive because of those factors.

* * * *

[318] W. L. JOHNSTON was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hays:

Q Will you state your full name, sir?

A William Lawson Johnston.

Q What is your address, sir?

A I live at 10,000 Sunbury Road, Westerville, Ohio.

Q Where are you employed, sir?

A With the Westerville Creamery Company.

Q What position do you hold with that company?

A President and general manager.

Q How long have you been president and general manager, sir?

A Six years.

Q How long have you been employed by the company?

A Thirty years.

Q What business is the Westerville Company engaged in, sir?

A They pack evaporated milk, fluid milk, powdered milk, cottage cheese, ice cream mix.

* * * *

[320] Q What were your total sales of evaporated milk for each of those years?

A In domestic sales, 1950, 641,981 cases.

In 1951, 597,171.

In 1952, 455,127.

In 1953, 571,574.

In 1954, 656,745.

In 1955, 701,847.

In 1956, 593,739.

In 1957, 589,242.

* * * *

[321] Q Since January 1st, 1956 have you been in competition with the Borden Company in the sale of private label evaporated milk?

A We have.

Q During the period January 1st, 1956 to July 31st, 1958, did you sell evaporated milk, private label, to the Colonial Stores, at Atlanta, Georgia?

A Starting what date, sir?

Q January 1st, 1956 through March 31st, 1958, at any time during that period were they a customer of yours?

A Yes.

* * * *

[322] Q I hand you Commission's Exhibit for Identification 2188 and ask you to examine it and tell me what it is and how it was prepared?

A These are sales during the 12 months prior of our last shipment to this branch and was prepared from our books.

Q Do you refer to your books as your invoices?

A That would be right.

* * * *

[324] Q From an examination of Commission's Exhibit 2188, it appears that the date of the last shipment to Colonial Stores was in April of 1957.

Have you sold or shipped any canned evaporated milk to that concern since that date?

* * * *

[325] A No.

* * * *

Q I hand you Commission's Exhibit for identification 2189 and ask you if it reflects the same type of information as Commission's Exhibit 2188 and was prepared in the same manner as that exhibit, except that it relates to shipments to Colonial Stores which were shipped to East Point, Georgia?

A Yes, sir.

* * * *

Q From an examination of Exhibit 2189, it appears that the last shipment to Colonial Stores shipped to East Point, [326] Georgia, was in November of 1957.

Have you made any other shipments after that date to Colonial Stores in East Point, Georgia?

A No, sir.

* * * *

Q I hand you commission's Exhibit for identification 2190 and ask you if it is true that this document was prepared in the same manner and relates to the same type of information as you have testified to with reference to Commission's Exhibit 2188, except for the fact that it relates to Colonial Stores shipped to Raleigh, North Carolina?

A Yes, sir.

* * * *

[327] Q From an examination of Commission's Exhibit 2190, it appears that the last shipment made to Colonial Stores, Raleigh, North Carolina, occurred April of 1957.

Have you made any other shipments after that date?

A No.

* * * *

Q I hand you Commission's Exhibit for identification 2191 and ask you if it is true that this document was prepared in the same manner and relates to the same type of subject matter as Commission Exhibit 2188, except that it is in reference to Colonial Stores, Norfolk, Virginia, sir?

A That's right.

* * * *

[328] Q I hand you Commission's Exhibit for identification 2192 and ask you if it is true that it was prepared in the same manner and relates to the same type of subject matter as Commission's Exhibit 2188 except that it is in relation to Cross, Abbott Company, White River Junction, Vermont?

A That's right.

* * * *

[329] Q From an examination of the invoices which support Commission's Exhibit 2192, can you tell

me what the date was of the last shipment to Cross, Abbott & Company by Westerville Creamery?

A The date listed here is April 30th.

* * * *

[333] Q I hand you Commission Exhibit for identification 2194, and ask you to — if it is true that this exhibit was prepared **[334]** in the same manner and relates to the same type of subject matter as Commission Exhibit 2188, except that it is in reference to the W. H. Dunne Company of Norwich, New York?

A That's right.

* * * *

Q I hand you Commission Exhibit for identification 2195, and ask you if it is true that this document was prepared in the same manner and relates to the same type of subject-matter as you have described with reference to Commission Exhibit 2188, except that it is in reference to Hannaford Brothers Company?

A Yes, sir.

* * * *

[335] Q From an examination of Commission Exhibit 2195, it appears that the last shipment to that company occurred in November — October of 1956.

Since that date, have you made any — has your company made any sales or shipment to Hannaford Brothers Company?

A No, sir.

* * * *

Q I hand you Commission Exhibit for identification 2196, and ask you if it is true that this document was prepared in the same manner and relates to the same subject matter as Commission Exhibit 2188, except that it is in reference to Milliken Tomlinson Company?

A That's right.

* * * *

[336] Q From an examination of Commission's Exhibit 2196, it appears that the last shipment to Milliken Tomlinson Company occurred in February of 1958.

Since that time have there been any other shipments by your company to Milliken Tomlinson Company?

A Not of evaporated milk.

* * * *

Q I hand you Commission Exhibit for identification 2197, and ask if it is true that it was prepared in the same manner and relates to the same subject matter as Commission Exhibit 2188, except that it is in reference to Oneida Markets?

A That's right.

* * * *

[337] Q From an examination of Commission Ex-

hibit 2197, it appears that the last shipment to that company occurred in November, 1957.

Since that date, have you made any shipments to Oneida Markets, Albany, New York?

A No, sir.

* * * *

[338] Q From an examination of Commission's Exhibit 2198, it appears that the last shipment to that company was made in January of 1956.

Since January of 1956, has your company made any sales to the T. R. Savage Company of Bangor, Maine?

A No, sir.

* * * *

[339] Q From an examination of Commission's Exhibit 2199, it appears that the last shipment to Thomas & Howard Company, Columbia, South Carolina, was in March of 1958.

A Mr. Hays, could I explain that?

Q You may explain that.

A We have some 6-ounce evaporated milk that were in storage which they promised to take out after that time, and they have picked up from time to time since then.

Q That was a sale that was consummated prior to March of 1958, but they had not drawn out all their shipments on that sale, is that correct?

A Committed, but not consummated. They were billed upon pickup.

* * * *

[340] Q The companies all referred to in Commission's Exhibit 2188 through 2199 were evaporated milk customers, is that correct?

A That is right.

Q And the figures on those exhibits referred to evaporated milk?

A Evaporated milk.

Q And they were private label evaporated milk customers, is that correct?

A Yes.

Q On or about the time or date of the last shipment to any of these customers, did you have on hand any of their private labels, any of their own labels?

A There were a couple.

Q What did you do with those labels?

A They were shipped, I would state, to the Borden Company in Illinois.

* * * *

[341] Q Insofar as your company is concerned, how long has the Borden Company been a competitive factor in the sale of private label evaporated milk?

A It was in the last year and ten months.

Q And since the Borden Company has become a competitive factor, has your company been confronted with any change in competitive positions — competitive conditions?

A Competitive conditions, our sales are down. The margins are down.

* * * *

[343] PAUL W. GEHL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hays:

Q What is your full name, sir?

A Paul W. Gehl.

Q What is your home address?

A 3401 West Thurston Avenue, Milwaukee, Wisconsin.

Q Where are you employed, sir?

A Gehl's Guernsey Farms.

Q Where is that located?

A Milwaukee.

Q Wisconsin?

A Wisconsin.

Q What position do you hold with that company?

A Vice-president.

Q How long have you held that position?

A Fourteen years.

Q How long have you been with the company?

A 30 years.

[344] Q In what business is the company engaged in?

A Dairy products.

Q What type of dairy products does it process?

A Fluid milk, or bottled milk, ice cream, evaporated milk, condensed milks of various kinds, powder milk.

Q How long has it been in the evaporated milk processing business?

A 45 years.

Q Where does it have its evaporated milk processing plant located?

A Germantown, Wisconsin.

Q What is the selling area insofar as evaporated milk is concerned, of your company?

A Selling area, primarily eastern United States and Havana, Cuba.

Q Is it east of the Mississippi?

A East of the Mississippi, north of the Ohio River.

Q Is your company in the business of processing private label evaporated milk?

A Yes.

Q Do you have any evaporated milk processed and sold under your own label?

A Do we have it processed under our own label?

Q And sold under your own label.

A Yes.

* * * *

[345] Since 1954, your sales have increased, is that correct, sir?

A Yes, sir.

Q What has been the reason for that increase?

A Well, the reason primarily is, we get surplus milk **[346]** out of the Milwaukee Milkshed during the summer months and our drying capacity is limited and sometimes, of course, we can't handle all the milk through our plant even if we had the drying capacity because of our condensing capacity and our various products that we produce. Consequently, the

simplest way, at times when we have a lot of milk is to put it into evap in the summer months and that's put out into the market. During the summer months only. That accounts for some of this increase.

Q To what class of customers was it sold?

A Usually the large chains.

Q I believe in one year you had sales of less than 84,000?

What were your 1954 sales?

A In 1953, it was 84,000. Nothing less than 84,000.

Q What is the reason for the low point in your sales?

A At that time?

Q Yes.

A We probably had less milk. Usually, it's accounted for by less milk. In other words, we have been increasing the capacity or the intake of our plant in order to get the costs of production down.

* * * *

[347] Q I hand you Commission's Exhibit 2200, and ask you to tell me what that is?

A That's a sales card showing the sales of evaporated milk to Dixie Homes Stores at Greenville, South Carolina.

* * * *

[351] Q Now, from an examination of Commission's Exhibit 2200, it appears that the last sale to Dixie Home Stores was made 4/9/57.

Have you made any sales of evaporated milk to that former customer since then?

A No, sir. Not since that date.

* * * *

Q I hand you Commission's Exhibit for identification 2201-A and 2201-B and ask you if it is true that it is similar to Commission's Exhibit 2200 in its preparation and what it relates to and the manner in which it was kept, except that it refers to a customer named Central Retailer-Owned [352] Groceries, Inc.?

A Yes.

* * * *

Q From an examination of Commission's Exhibit 2201-A and B, it appears that the date the last shipment to Central Retailer-Owned Grocers occurred in 7/17/56.

A Yes, sir.

Q Since that date have you sold or shipped any private label evaporated milk to that customer?

A No, we haven't.

* * * *

[353] Q Your increase in total sales since 1953, has that been obtained through increased sales to specific customers or obtaining more new customers, or both?

A Both.

Q To what extent have you obtained new customers?

A You mean percentage-wise?

Q Where have the customers come from?

A Well, the customers that we gained were somewhere out in the East and we received a few in our immediate territory.

That is, in Wisconsin, near Wisconsin, but primarily in the East.

Q Prior to becoming your customer, were they someone else's customer?

A Yes. I don't know who they were, whose customers they were, but they apparently were someone else's customers, sir.

MR. HAYS:

Cross examine.

CROSS EXAMINATION

By Mr. Wood:

* * * *

[356] Do you know whether or not the Dixie Home Stores at Greenville, South Carolina transferred their patronage to somebody else in 1955 for a brief time?

A Apparently they did. There is a period there, I believe we did not get any business from them so apparently they, no doubt, gave some of their business to someone else.

Q Do you have personal knowledge as to who got that business, sir?

A No, I don't.

Q I take it, it is fairly normal practice that customers come and go, isn't it? They buy from you for

a while and [357] then they buy from somebody else for a while, and they then come back?

A Well, not always.

Q But that does happen?

A It does happen.

* * * *

[359] JOHN E. DeMASTER was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hays:

Q What is your full name, sir?

A John E. DeMaster.

Q What is your home address?

A Juneau, Wisconsin.

Q Where are you employed?

A Juneau, Wisconsin, with the Dairyland Cooperative Association.

Q How long have you been employed there?

A Since 1953. The fifth year.

Q Have you been employed there five years?

A Yes, sir.

Q What is your position with that Cooperative?

A Assistant Sales of all bulk dairy products.

Q How long have you held that position?

A Two years.

[360] Q Prior to that time what did you do for the Cooperative?

A I was in the retail division in the City of Milwaukee.

Q What type of business is the Cooperative in?

A Primarily the receipt of milk and manufacturing into butter, powder, evaporated milk and cheese.

* * * *

[361] Q Did you bring with you the figures that I asked for with reference to the production of evaporated milk by the Cooperative for each year from 1950 to the present?

A Yes, I did.

MR. HAYS:

Just so the record is clear, these are production figures, Mr. Wood. They are not sales figures.

THE WITNESS:

The production record would practically be the same as sales because we had practically no inventory at the end of the year because it was seasonal.

By Mr. Hays:

Q Will you state what those production figures were?

A Yes, sir. In 1950 we packed and sold 38,754 cases.

In 1951, we packed 334,131 cases.

In 1952, we packed 173,346 cases.

In 1953, 17,423.

In 1954, 28,799.

In 1955, 25,766.

[362] In 1956, 49,404.

In 1957, 11,450.

Q And you stopped processing when in 1957?

A Sometime in April, as I remember it, 1957.

Q This evaporated milk, the production figures for which you have given, was that sold under the cooperative label or a private label?

A Mostly private label.

Q During the time that the Cooperative packed evaporated milk, approximately what percentage of its sales were private label and approximately what percentage were under its own label?

A To the trade I would say the private label was possibly 20, 25 per cent and the balance private label. I should have said Cooperative label, 20, 25 per cent, private label, about 75 per cent.

Q That held true generally throughout the period for which you have given the production period?

A That did except the high pack periods. A great deal of it went to the Government and that went out under the company label. That was not domestic business, however.

Q What were the high pack periods to which you have just referred?

A Three hundred —

Q What year?

[363] **A** That was 1951, I believe, sir. The high pack period was '51.

Q From the figures that you have given, it is apparent that the sales and the — the production and sales of the Cooperative had declined since 1950 through 1957 when it went out of the business?

A That's right.

Q What do you account for that? Can you give any reason for the decline in sales and ultimately going out of business of the Cooperative?

A Well, primarily the freight rate is always against us from the east, from the Middle West. In other words, even our friends in Ohio would have a freight rate advantage against us in the east of 15, 20 cents a case which, of course, made it difficult to compete with. We were not buying milk that much cheaper in the Middle West as they were, we will say in Ohio and the East here, so we could hardly absorb that difference.

Q In other words, the people with plants located to the east of your plant had a freight rate advantage?

A Yes, they did.

Q Because they were nearer to the metropolitan markets in the East?

A That's right.

Q During the period January 1st, 1956 through March 31, [364] 1958, were you in competition with the Borden Company in the sale of private label evaporated milk?

A I didn't know that we were until we were advised to ship all of our labels to Borden's.

Q Will you state the facts surrounding the shipment of those labels to Borden?

A Well, we had been selling private label milk, as the record indicates there, all through the early part of '56 and in a little larger volume in '55 and I think it is in August, or whatever the date is, you have the sheet there, August or September, we received instructions to ship all of our private labels to the Borden Company.

Q Were they private labels with reference to a particular customer?

A Well, it was to a particular brand which was Food Club.

Q What concern had the Food Club brand?

A The Topco Associates.

* * * *

Q Mr. DeMaster, I hand you Commission's Exhibit for identification 2202A through C, and ask you to look at it and [365] tell me what it is and how it was prepared.

A This is a copy of the invoices of milk shipped to these various companies, amounting to a total of 23,845 cases. The amount of money is \$126,838.12.

Q How was that document prepared?

A It is an exact copy. I copied it exactly off the invoices, that these people were invoiced on.

Q The people you refer to are the branches of Topco Associates?

A They are the people that make up the Topco organization. The Topco organization gave us orders to ship this milk to the various customers as listed here.

We shipped it to them and invoiced it to them.

Q Since the time that you have gone out of it, your company has gone out of the production and sale of evaporated milk, have you sold any evaporated milk to Topco Associates?

Obviously you have not.

A No, we have not.

* * * *

[366] CROSS EXAMINATION

By Mr. Wood:

* * * *

[369] Q Who were the friends in Ohio that you spoke of who had a freight advantage over you?

A Well, I think all the Ohio plants. I don't know all of them but Westerville and the Defiance people. We paid practically the same price for milk that they did and naturally, to Pittsburgh and to the East here they would have a freight advantage, which was okay.

It was one of those things, that is the way it was.

[370] It could not be helped.

* * * *

WILLIAM DIEHL was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Diehl, for the record would you give your full name and your home address.

A William A. Diehl, Defiance, Ohio.

Q With what concern are you associated?

A With the Defiance Milk Products Company and with Nashville Milk Company.

[371] Q What is the address of the Defiance Milk Products Company?

A The office address is 24 North Clinton Street, Defiance.

Q What position do you occupy with that concern?

A I am President of the company.

Q How long have you held that position?

A About four or five years.

Q What is the address of the Nashville Milk Company?

A The office of the company is at the same address at Defiance, Ohio.

Q Where is its plant located?

A At Nashville, Illinois.

Q What position do you occupy with that concern?

A I am President of Nashville Milk Company also.

Q How long have you been President of that concern?

A About eight years.

Q Are both of these companies engaged in the same type of business?

A Generally, yes.

Q Do they — do you package and sell evaporated milk at both plants?

A We do.

* * * *

[374] Q Through March, 1958, has Defiance sustained any loss?

A We have.

Q Do you have the names of those customers lost by Defiance?

A Yes, I have.

Q Would you recite those customers, please.

A I have several listed here. One is Colonial Stores, Inc., Eastport — Eastpoint, Georgia. The other one is

[375] Central Retailer-Owned Grocers, Inc.

Q With regard to Colonial Stores, Inc, what was the date of your last sale to that organization?

A Colonial? I don't recall exactly but it was about September, 1957.

Q Since that time have you made any sales at all to Colonial Stores, Inc.?

A Not of evaporated milk.

Q With regard to Central Retailer-Owned Grocers, Inc., when was your last sale to that organization, the approximate date?

A Well, we have —

Q Of evaporated milk, of course.

A We sold a small amount of milk to one — shipped it to one point for Central Retailer-Owned Grocers up until comparatively recently.

Q Do you have an approximate date with regard to your last sale?

A It seems to me it was several months ago.

Q Well, March?

A Say, July or August.

Q Were you or are you aware within your own personal knowledge of the name of the concern which began selling to Colonial Stores, Inc., after you ceased your sales to that concern?

[376] A I think it was the Borden Company.

Q How do you know that within your own personal knowledge?

A I have investigated the matter and picked up some samples of the milk that is now being sold in their stores and we have shipped some cartons that were imprinted Colonial Stores to Borden Company at Lewisburg, Tennessee.

Q When did you ship these cartons?

A They were shipped, I think, in July or August. Just recently.

* * * *

[377] By Mr. Coughlin:

Q Mr. Diehl, with regard to the customers of the Nashville Milk Company, since January 1, 1956, have you lost any of the customers to whom evaporated milk has been sold by Nashville?

A We have.

Q You have a list of those companies with you?

A Yes, I have.

Q Would you recite it for the record?

A Winn-Dixie — Tampa, Inc. at Tampa, Florida.

Q How many cases there?

A 18,750 was the amount shipped by us in the preceding 12 months.

[378] Q When was the date of your last sale to Winn-Dixie-Tampa, Inc.?

A My recollection is it was early in 1957. About February or March.

Piggly Wiggly Wholesale Distributing at Charleston, Carolina, 6,963 cases.

Q When was the approximate date of your last sale to that concern?

A I think it was mid 1957, June or so.

Q What is the next concern?

A Central Retailer-Owned Grocers in Chicago, 6,450 cases.

Q And the approximate date of your last sale to that concern?

A The first half of 1957.

Winn-Dixie-Montgomery, Inc. at Montgomery, Alabama, 5,695 cases. The last shipment to them was approximately March of 1957.

* * * *

[379] Q And the next concern?

A The next concern is Thomas & Howard Company at various locations in North Carolina, South Carolina and Florida.

The total number of cases 17,442.

Q What was the approximate date of your last sale to that concern?

A The last sales to those different points ranged over a period of probably six months.

Q In what year?

A Well, the latter part of 1956 to the early, first part of 1957.

Q What is the next concern that you have listed?

A Colonial Stores, Inc., Eastpoint, Georgia, 18,255.

Q And the approximate date of the last sale to that concern?

A The last shipment to Colonial in evaporated milk was approximately September 17. September, October.

* * * *

[384] Q Mr. Diehl, I'd like to show you at this time what has been offered for identification as Commission's Exhibits 2207 through 2229, and ask you whether these are the sales cards from your concern which reflect — which are those of the customers lost by

both the Nashville Milk Company and by the Defiance Milk Company as stated by you before on the [385] record?

A They are our sales cards.

* * * *

[386] Q Well, with regard to any of these customers of Nashville, did you have occasion to ship any labels, cartons or the like to another concern?

A We shipped some of the labels for Piggly Wiggly.

Q Which Piggly Wiggly is that?

A Corporation of Charleston, South Carolina.

Q To whom did you ship —

A I can't say positively that those went to Borden.

Q Was there any other concern that you have —

A I examined some milk being offered for sale by one or more of these customers and I identified it as being packed by Borden.

Q Can you name the customers?

A Well, one was Winn-Dixie.

Q Is that the Winn-Dixie-Tampa?

A At Tampa.

Q Is there another one that you know of?

A Colonial Stores at Eastpoint.

Q That is Eastpoint, Georgia?

A Yes.

* * * *

[388] Q Mr. Diehl, is this a list of the figures you recited in the record for the sales for both Defiance

Milk Company and Nashville Milk Company respectively for the period 1951 to 1957?

A Yes.

Q I notice from these figures that your sales have increased both for Defiance and for the Nashville Milk Company during this period.

To what do you attribute this increase in sale?

A Well, there have been several other evaporated milk plants which have gone out of business and in addition we have sold some people private label milk who did not handle private label milk previously.

* * * *

[389] CROSS EXAMINATION

By Mr. Wood:

* * * *

[391] Q Is there some corporate relationship between Nashville Milk Company and Defiance — between Nashville Milk Company and Defiance Milk Products Company?

A Nashville Milk Company is a wholly owned subsidiary of Defiance.

* * * *

Q These customers that you have listed here as having lost, are these the first customers your company has ever lost?

A No, they are not.

[392] Q You have lost a good many over the years?

A We have lost some, yes.

Q And you have gained some?

A We have gained some.

Q And you would expect that to be true in a normal competitive situation, wouldn't you?

A Yes.

* * *

[394] Q You have acquired a new plant of some sort in Tennessee, haven't you?

A We have.

Q Where is that located?

A That's located at Jonesboro, Tennessee.

Q Is it not your plan to begin packing evaporated milk at that plant?

A Not definitely. It is a possibility.

Q You are considering it as a possibility?

A Correct.

* * *

[395] REDIRECT EXAMINATION

* * *

Q And when did you first lose a customer to the Borden Company, that you know about?

A The first was early in 1957.

Q So it is only at least in 1957 as far as you know that you ever lost a customer to the Borden Company?

A Yes.

Q Was it in 1957 that they first became a competitive factor in the private label evaporated milk field as far as your company is concerned?

A I think that's correct, yes.

* * * *

[396] Q Were the customers that you lost to the Borden Company important to you?

MR. WOOD:

Objection. I think that is an objectionable question. Of course customers are important. All the customers are important to all businessmen. We will so stipulate.

MR. HAYS:

My next question will be —

HEARING EXAMINER LIPSCOMB:

Of course that is true but the answer won't hurt.

You may answer.

A The customers we lost were extremely important to us.

Q Why was it they were important to you?

A Colonial Stores was, I guess the biggest customer that we had and their volume compared with our total sale was very substantial.

* * * *

[404] Thereupon,

WILBUR HARTLEY

was called as a witness for the Commission and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q For the record, Mr. Hartley, would you give your full name and your home address?

A Wilbur Hartley; no middle name.

Q Where do you live, Mr. Hartley?

A Columbia.

Q Your address?

A You want the residence address or the business address?

Q Residence.

A 3625 Devine Street.

Q In what business are you engaged?

A I am a wholesale grocer.

[405] Q Under what name are you doing business?

A Hartley Grocery Company.

Q Where is that located?

A 808 Lady Street.

Q In Columbia?

A Columbia.

Q What position do you occupy in this concern?

A I am the owner of the business.

Q What are the names of other wholesale grocers in the City of Columbia?

A Thomas & Howard Company, Merchants Whole-

sale Grocery, Geiger Flour Company, Rawl Distributing Company.

Q Mr. Hartley, do you purchase evaporated milk from the Borden Company?

A Yes, we do.

Q Under what label do you purchase evaporated milk from Borden?

A Silver Cow.

Q How long have you purchased from the Borden Company evaporated milk?

A Well, that would probably be 25 years or more.

* * * *

[408] Mr. Hartley, what price were you paying for Borden brand evaporated milk in April of 1958 or March of 1958?

A \$6.60 per case.

Q Now, what was your mark-up from the cost, \$6.60 at which you sold a case of Borden brand evaporated milk to your customers?

A Well, the price we sold it at ranged from \$6.70 to \$6.75.

Q In other words, you would have a 10 to 15 cents per case mark-up from cost?

A That is correct.

Q Now, Mr. Hartley, as an average, using the 10 cents to 15 cents mark-up from cost, what amount of that mark-up is consumed by overhead costs, handling costs and the like?

A You are referring to our overhead?

Q Yes, entirely.

A Well, our average cost on per dollar sales would be more than six percent.

Q Six percent on a dollar?

A Yes.

Q Then, using that as a basis what amount of the — well, using 15 cents as the basis, the maximum price at which you [409] sell a case of Borden brand evaporated milk to one of your customers, what amount of that 15 cents may be regarded as profit returned to you?

Do you understand what I mean?

A Well, you could regard —

MR. LUKINGBEAL:

May I object to that question? I don't think he had laid a proper foundation because if I understood the witness' testimony he spoke of an average cost which I understood in context to mean the overall of his lines of merchandise.

MR. COUGHLIN:

I will rephrase that, Mr. Lukingbeal.

By Mr. Coughlin:

Q You use an average cost, I believe, of 6 percent on a dollar?

A Yes, just a little over 6 per cent.

Q For all products you sell?

A That is right.

Q Have you or are you able to break down that percentage for overhead to cover a figure of 15 cents mark-up on a particular product? In other words, if I asked you to determine the cost of overhead in the handling of a particular item are you able to give that?

A No, I am sorry I am not.

Q Well, do you regard — do you know what I mean, [410] Mr. Hartley, when I ask you what you regard as a profit item you may handle: For instance, what products are profit items to you and what products you do not expect to realize profit on?

A Yes.

Q I see.

A I understand.

Q Now, using that as a basis, Mr. Hartley, is evaporated milk a profit item to you?

A No, it isn't; it is non-profit.

Q Then, if it is a non-profit item, Mr. Hartley, why do you handle it?

A Well, to accommodate our customers, our retail grocers.

Q You find that there is a consistent demand for evaporated milk from your customers?

A Certainly.

Q And why is evaporated milk in such demand if it is not a profit item?

A Well, the consumer demands evaporated milk from the grocery store and as a wholesale grocer we would be at a disadvantage if we did not stock evaporated milk.

Q You mentioned, Mr. Hartley, that you pay \$6.60 for a case of Borden evaporated milk, a brand label, and that you will have a maximum mark-up there of 15 cents a case on the cost to your customer. If you could obtain evaporated [411] milk at a price less than \$6.60 a case using as a basis, say in April of 1958, of roughly \$5 to \$5.25, would you be interested in obtaining that product?

MR. LUKINGBEAL:

I object to the question; two reasons for the objection. The first, the question referred to April 1958 whereas throughout the proceeding we have been stopping at March 31, 1958, the date of the complaint.

My other objection is that I think the question should be phrased so as to make it clear whether he is or is not talking about the Borden brand evaporated milk. His other questions have been directed to Borden brand.

MR. COUGHLIN:

In answer to the first, your Honor, the reason why I use the month of April is that the Borden Company has furnished the Commission or counsel supporting the complaint with invoices through the month of March 1958 detailing the price of private label evaporated milk in this vicinity.

I would be willing, certainly, to use the month of March rather than the month of April as a basis for directing this type question to the witness.

Secondly, I will make more clear the type milk involved, in my question with Mr. Hartley.

HEARING EXAMINER LIPSCOMB:

All right, do that.

By Mr. Coughlin:

Q Mr. Hartley, I rephrase, then, that question to regard [412] the month of March 1958 as a basis for the question rather than the month of April. And secondly, I would use not Borden brand evaporated milk but another label evaporated milk instead, a private

label evaporated milk, and ask you again whether if you had the opportunity or had had the opportunity in March of 1958 to purchase Borden evaporated milk under a private label at a figure of approximately \$5 to \$5.25 a case, would you have been interested in purchasing this product?

MR. LUKINGBEAL:

Well, your Honor, I am sorry to have to object again. The question spoke of an opportunity to purchase Borden evaporated milk under a private label. Frankly, I don't understand the question and I would doubt that we would get a clear statement from the witness as to what he may understand about it.

MR. COUGHLIN:

Suppose I put it this way then, Mr. Lukingbeal. I was going to ask this question eventually.

By Mr. Coughlin:

Q Has the Borden Company ever offered you a private label evaporated milk?

A Not to my knowledge.

Q If the Borden Company offered you a private label milk at the price I have just mentioned, say \$5 to \$5.20 a case, would you have been receptive to that offer?

A I feel sure we would have.

[413] Q And why would you be interested in obtaining a private label evaporated milk at that price?

A Well, in order to meet competition.

Q Mr. Hartley, at the beginning of your testimony I asked you whether you would name other wholesale

grocers in the City of Columbia, which you did. Now, you mentioned first of all, I believe, Thomas & Howard Wholesale Grocery?

A That is right.

Q Are you competing for customers and competing in business with Thomas & Howard in the City of Columbia?

A Yes, we are.

Q Is that the same also for Merchants Wholesale Grocery?

A Yes, we are.

Q And for the Rawl Distributing Company?

A Yes.

Q In other words, all of the wholesale grocers mentioned by you you regard as being in competition with your concern in the City of Columbia?

A Yes, we do.

Q And you have been for the past three years?

A Yes, sir, we have been in business in Columbia since 1929.

MR. COUGHLIN:

Your Honor, at this time I would like to offer into evidence Commission Exhibit for identification No. 2230 and would like to remark that we would [414] be willing or would like to have all information subsequent to March 31, 1958 deleted from the exhibit.

* * * *

Q Mr. Hartley, within your knowledge are the stores to whom you sell, your customers, retail stores; is that correct?

A That is right.

Q Are they in competition in the City of Columbia

with the large chain-operated stores such as Winn-Dixie, Colonial?

[415] A Oh, yes, they are in competition. In other words, the big supermarkets are — certainly they are. In other words, they are in competition to the big supermarkets.

Q Thank you, Mr. Hartley.

MR. COUGHLIN:

I don't have any further questions, your Honor.

MR. LUKINGBEAL:

Since this is the first witness of this type I would appreciate a few minutes to talk with my colleagues, if I may.

HEARING EXAMINER LIPSCOMB:

Surely. We will have a short recess.

(A short recess was taken.)

HEARING EXAMINER LIPSCOMB:

The hearing will be in order.

CROSS EXAMINATION

By Mr. Lukingbeal:

Q Mr. Hartley, when you buy the Borden brand evaporated milk from the Borden Company for \$6.60 a case you do get a 2 per cent discount for cash on that, don't you?

A Yes, 2 per cent in ten days.

Q And that is in effect an additional amount of

profit that you make when you resell it in addition to the ten or fifteen cents that you talked about?

A Yes, that would be in addition.

Q Mr. Hartley, you mentioned that you carry the Borden [416] brand evaporated milk — I forget your exact words, but I interpreted it to mean as an accommodation item for your customers?

A We do.

Q That has been true for many years, has it not?

A Well, yes, it has, but of course I can remember not too many years ago we could make more than 10 or 15 cents a case profit on milk, evaporated milk.

Q About how far back would you have to go to find that so?

A Let's see now. My memory is not too good, but I would say probably ten or fifteen years back.

Q Is it fair to say, Mr. Hartley, that during the last ten years or so you have been handling the Borden brand evaporated milk as an accommodation item and — let's stop here. I will rephrase the question, your Honor.

Is it fair to say, Mr. Hartley, that during the last ten years, at least, you have been handling the Borden brand evaporated milk as an accommodation item?

A I didn't quite — repeat that, please.

Q Would you repeat the question?

(Question read.)

A Yes.

Q And during the past ten years have you, in general, been reselling the Borden brand evaporated milk at about the same mark-up that you have mentioned

here today, that is the 2 [417] per cent discount plus 10 to 15 cents per case?

A Repeat that, please.

HEARING EXAMINER LIPSCOMB:

Would you read it?

(Question read.)

A Yes, that is right.

By Mr. Lukingbeal:

Q Mr. Hartley, have you ever asked the Borden Company to pack a private label evaporated milk for you?

A No, I haven't.

Q Have any of your customers ever asked you to provide them with a private label evaporated milk?

A No, we haven't had any of our customers to ask us for a private label for any particular store but we have had a demand for a lower priced evaporated milk.

Q Well, I don't mean to be facetious at all, Mr. Hartley, but don't you always have a demand for lower-priced products? I mean that is generally true, isn't it, as to everything?

A Well, on commodities we handle as accommodation to our customers, of course they are very anxious to buy some commodities to be competitive with the chains.

Q But none of your customers have ever asked you to furnish them with a private label evaporated milk?

A Well, I will have to answer your question like

this: We have had a demand for the milk that we can sell for less than we can sell Silver Cow milk.

[418] Q Mr. Hartley, are the Red and White retail stores here in Columbia among your customers?

A Oh, yes.

Q You sell them evaporated milk?

A Yes, we sell the independent stores evaporated milk.

Q I am sorry, sir. I was just speaking of the Red and White stores.

A Well, we sell some of the Red and White stores

Q Here in Columbia?

A Yes, we do. I will say we sell a few of the Red and White stores.

Q Do you sell the Piggly Wiggly stores evaporated milk?

A I don't believe that we do. I don't think so.

Q Mr. Hartley, you mentioned that you consider yourself in competition here in Columbia with the Rawl Company?

A Rawl Distributing Company.

Q Rawl Distributing Company. Do you have any information to the effect that the Rawl Distributing Company at any time since January 1, 1956 has been selling here in Columbia any private label evaporated milk packed by the Borden Company?

A No, I don't believe I know about it.

Q You also mentioned as another company that you consider one of your competitors the Merchant Distributing Company?

A Merchants Wholesale Company.

Q Merchants Wholesale Company. Do you have any information **[419]** to the effect that Merchant

Wholesale Company has at any time since January 1, 1956 been selling any private label evaporated milk packed by the Borden Company?

A No, I don't believe that I do.

Q You mentioned another company, Mr. Hartley, that I am afraid I don't have the name right at all; I have it down here Yale Flour?

A G-e-i-g-e-r.

Q Geiger?

A You can pronounce it that way probably.

Q Geiger Flour Company?

A That is right.

Q I am asking the same question, Mr. Hartley, as to whether you have any information about their selling a private label milk packed by Borden?

A No, I don't.

Q Mr. Hartley, the tabulation which you brought with you this morning which is now Commission Exhibit 2230 with regard to your purchases of Borden brand evaporated milk goes back as far as January 1956.

In the calendar y e a r 1955, I believe according to the information I have here from the Borden records, your purchases of Borden brand evaporated milk were substantially higher than they were in the year 1956. Is that in accordance with your recollection?

[420] A Well, I wouldn't know unless I would refer to the records. I really wouldn't.

Q Would you have any general recollection as to whether your purchases of Borden brand evaporated milk in, say, the three or four years prior to 1956

were higher or lower or about the same as in '56 and '57?

A Well, since milk is an accommodation commodity it might be that our sales force have not pushed milk as much as they have probably going back to you might say 1955.

MR. LUKINGBEAL:

Off the record, your Honor?

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

By Mr. Lukingbeal:

Q Mr. Hartley, during our off-the-record discussion here we have made some arrangements whereby we hope to get into the record later in the day and without the necessity of your coming back, the amounts of your purchases of Borden brand during the year 1955.

If I correctly understand you, however, in your last statements on the record, it is your impression that your purchases of Borden brand were higher during 1955 than they were in '56 and '57. Is that correct, sir?

A I am pretty sure that is what we are going to find.

Q What is your explanation, Mr. Hartley, for the drop in [421] your Borden brand purchases and sales in 1956?

A Well, beginning in 1956 we discontinued paying

our salesmen a straight salary. We changed to a plan whereby the salesman gets a percentage of the gross profits on his sales. And that is his compensation for his salary and his travel expense.

Q Well, I take it you are suggesting, Mr. Hartley, that there was something in that change that resulted in less effort being expended on the part of your company generally directed to pushing evaporated milk; is that correct, sir?

A Absolutely; that is correct. Well, I would like to add this to the answer: Let me add this: The salesmen have taken that initiative, the salesmen for the company. In other words, we did not ask the salesmen to put less effort on the sales of evaporated milk.

Q No, I think — I understood you to be saying, however, that as a result of the change in your method of compensating your salesmen.

A That is correct.

Q Less effort is being directed to pushing evaporated milk?

A That is correct.

Q Mr. Hartley, you have said that your mark-up on the Borden brand evaporated milk is 10 to 15 cents a case plus the amount of your 2 per cent cash discount that you get from [422] Borden. You also said that if you had been approached with respect to a private label evaporated milk packed by the Borden Company at a lower price, I forget the exact figure Mr. Coughlin mentioned but something on the order of \$5.50 or so as compared with the \$6.60 that you pay on the Borden brand, that you would have liked to buy that, I think you said in order to meet competition.

I take it, Mr. Hartley, you were not suggesting that

you would have been able to resell that private label evaporated milk for anything like the price at which you resell the Borden brand evaporated milk, were you?

A I wouldn't think so, I wouldn't think we would be able to get the same price for it. I wouldn't think so.

Q There is, I think, a very substantial difference in the general price levels at which the advertised brands, I believe you have mentioned Pet and Carnation in addition to the Borden brand, sell on the market and the prices at which these private labels sell? Is that correct, sir?

A But I do think you can get a better mark-up on a private label brand than you can on a nationally advertised brand.

* * * *

[423] Q Mr. Hartley, I asked you earlier whether there is not a very substantial difference between the prices at which the advertised brands of evaporated milk — I think you mentioned Pet and Carnation in addition to Borden — sell, and the prices that are commanded in the market by the private label evaporated milks. Is that correct, sir?

A I don't quite understand just what you — the question about the difference. Are you asking about the difference between the prices —

Q The prices, not the profit making, sir. I am asking you now only about the prices at which the two different **[424]** types of commodities generally sell in the market both at wholesale and at retail?

A Well, yes, there is a difference in the cost.

Q Is it your understanding that a company in the wholesale grocery business as you are which handles a private label evaporated milk sells that milk to its customers at a lower price than the price charged by wholesalers for the advertised brands of evaporated milk?

A Why, yes, the private label would sell for less to the grocery stores.

Q And is that generally true as to the prices charged by the retail stores to their customers?

A Well, yes, they would follow through, I believe, and sell it for less than they do the nationally advertised brands.

Q Had that general picture, that is of a higher price for the advertised brands and a lower price for the private labels, has that been true over the years, say over the last ten years or so?

A Well, it probably has.

MR. LUKINGBEAL:

That is all.

REDIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Hartley, I have only a few questions.

Mr. Hartley, is it your knowledge that the private [425] label evaporated milk competes with brand label evaporated milk in retail store sales?

MR. LUKINGBEAL:

I object, your Honor. That calls for a legal conclusion on the part of the witness.

* * * *

[426] Q Well, Mr. Hartley, with your permission, your Honor — I will rephrase it somewhat.

What I mean is this, Mr. Hartley: In a retail grocery store is the sale of brand label evaporated milk in competition with the sale of private label evaporated milk to customers of that store? In other words, they have evaporated milk of the brand on one shelf and the next shelf they may have a private label evaporated milk, is that not so?

A Yes, it could be.

Q Then, based upon your experience and knowledge of grocery sales, would you regard these two items to be in competition with each other?

A Well, yes, they would be in competition with each other, they certainly would. To my knowledge they would.

Q Thank you.

Mr. Hartley, one further question, if I may.

Mr. Lukingbeal at the beginning of his cross-examination asked you about this 2 per cent ten days that you get from the Borden Company for purchases of brand label **[427]** evaporated milk.

Now, when you stated that your sale of evaporated milk under the brand label of the Borden Company is not regarded as a profit sale were you also including or did you have in mind that amount you realized through the 2 per cent discount accorded by the Bor-

den Company in your purchase of their brand label evaporated milk?

A Referring to the price that we sell Silver Cow evaporated milk which is approximately 10 or 15 cents over the invoice cost, if we included the cash discount we would still be selling that product at a loss.

Q Thank you, sir.

MR. COUGHLIN:

That is all I have.

RECROSS EXAMINATION

By Mr. Lukingbeal:

Q Mr. Hartley, with regard to your testimony as to whether the private label and the advertised brands compete on the store shelves, if I understood you correctly your knowledge of that is based on the fact that you have observed that in particular retail stores you may see both advertised and private labels on the shelves, is that correct?

A That is correct. Now, to my way of thinking Mrs. Consumer, when she buys evaporated milk, why, of course, if she can buy some other brand that would give her — I mean if she is satisfied in buying some other brand that costs [428] less than a nationally advertised brand, why, of course some consumers will switch to a brand that they can buy for less and that is why I made that statement.

Q Have you ever made any particular observations about that in any particular retail store?

A No, I haven't, but my salesmen have.

Q Well, Mr. Hartley, you said that some custom-

ers might switch from the advertised brand to private label if the price difference is big enough. I take it you are not suggesting that all of them would?

A Beg your pardon?

Q You are not suggesting that all people who use evaporated milk would switch from the advertised brand to one of these off-name brands?

A I wouldn't think so.

Q All right, sir.

MR. LUKINGBEAL:

That is all, sir.

* * * *

【430】 Thereupon,

CHARLES D. BLACKMAN

was called as a witness for the Commission and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Blackman, are you appearing in answer to a subpoena served?

A Yes, sir.

Q Do you have that subpoena with you?

A Yes, sir.

HEARING EXAMINER LIPSCOMB:

Off the record.

[431] (Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

By Mr. Coughlin:

Q For the record, your Honor; Mr. Blackman, are you appearing in the stead of Mr. Jasper Rawl whose name appears on the subpoena you have just given to the hearing examiner?

A Yes, sir; that is right.

Q Would you give your full name and address?

A Charles D. Blackman and my home address is 311 Hardin Street, Columbia, South Carolina.

Q In what business are you engaged, Mr. Blackman?

A Wholesale grocery business.

Q For whom do you work?

A Rawl Distributing Company.

Q Where is that located?

A Here in Columbia.

Q The address, please?

A At 1055 Berea Road.

Q What is your position with that concern?

A I am assistant manager.

Q And how long have you occupied that position?

A Nine years.

Q Of what do your duties consist?

A Well, I handle all of the records, I pay all of the bills, and I am sales manager, do some selling; I am in **[432]** charge of the overall operations of the company under Mr. Rawl.

Q Mr. Blackman, would you recite for the record

the names of other wholesale grocery companies in the City of Columbia?

A Yes, sir: Thomas & Howard Company, Merchants Wholesale Grocery Company, Hartley Grocery Company, Geiger Flour Company.

Q Are you in competition with these concerns in the wholesale grocery business in the City of Columbia?

A Yes. There is also another one I didn't name that we are in competition with, too, is Piggly Wiggly.

Q Mr. Blackman, does your concern purchase Silver Cow label evaporated milk from the Borden Company?

A Yes, sir.

Q For how long approximately have you purchased this product from the Borden Company?

A We have purchased it for I would say, well, nine years to my knowledge, and before I went there. I would say approximately fifteen years perhaps, all together.

Q Do you purchase evaporated milk from the Borden Company under any other label than the Silver Cow label?

A No, sir.

Q Has the Borden Company ever offered you any evaporated milk under a label other than Silver Cow?

A No, sir.

[433] Q Mr. Blackman, in March of 1958 what price were you paying per case for Borden brand evaporated milk in the tall can size?

A \$6.60.

Q At what price did you sell this product to your customers?

A \$6.70.

Q In other words, Mr. Blackman, you had a ten cent markup from cost?

A Right.

Q Do you regard evaporated milk as being a profit item to you?

A No, sir.

Q Why is that?

A It is handled merely as a convenience because of the low margin of profit. There isn't any profit. Actually, we lose money.

Q Why do you handle the product?

A It is a matter of convenience to our customers.

Q Mr. Blackman, I believe you stated that the Borden Company has not offered you an evaporated milk under any label other than the Borden Silver Cow label, is that correct?

A That is correct.

Q Now, in March of 1958 if the Borden Company had offered you an evaporated milk under another label at a price of, say, \$5 to \$5.25 would you have been interested?

[434] A Yes, sir.

MR. LUKINGBEAL:

Objection to that. My objection, sir, is based on what I believe to be the fact, that there is no basis in the record for counsel's suggestion in the question that Borden at any time had a price of \$5 to \$5.25 on private label which would be comparable with the price of \$6.60 on the Borden brand that he referred to.

MR. COUGHLIN:

Would you make that objection a little more clear, please?

MR. LUKINGBEAL:

I object to your question on the ground that it includes a reference to a hypothetical Borden price for private label of \$5 to \$5.25 and I object on the ground that there is no basis in the record for that.

MR. COUGHLIN:

Your Honor, if I may say this, the reason for my using this area of \$5.00 to \$5.25 which is really a differential we will say — well, it is a differential of 25 cents, upon analysis of the invoices furnished by the Borden Company it appears that there was a price of around \$5, a little in excess of that, including freight at which this private label was sold in the Columbia area through shipment from the Chester, South Carolina plant and I use that ratio or that range as a basis for the question that I asked of the witness.

I don't believe it is based on fantasy but upon the record.

[435] HEARING EXAMINER LIPSCOMB:

The objection is overruled.

You may answer.

A We would be interested; yes, sir. The question was would we be interested in buying milk under a private label at that price.

By Mr. Coughlin:

Q "Yes," it was?

A Yes, we would.

Q In that price range?

A Yes, sir, very definitely we would be interested.

Q Why do you say that?

A We could sell it so much cheaper and I believe we could sell it at a profit.

Q Would you sell the private label brand at the same price you sell the Borden brand?

A No, sir, it would be sold at a lower price.

Q Mr. Blackman, a short while ago I believe you stated on the record that you sell evaporated milk as an accommodation to your customers, is that correct?

A That is correct, yes.

Q If there is no profit realized from the sale of evaporated milk then for what purpose do your customers ask for and receive evaporated milk?

Do you understand the question?

[436] A Well, they sell it; they do that so they can sell it in competition with the chain stores. That is my personal opinion. See, milk is an item that is kicked around by everybody.

Q How do you mean that?

A Well, it is sold at no profit by the retailers and the wholesalers, I will put it that way.

Q I see, Mr. Blackman, and why is it sold? That is the reason I asked that question primarily.

A Well, there is such a tremendous volume of milk used. It is one of the non-profit items in the retail and wholesale grocery business.

Q But there is a requirement —

A There is a definite requirement.

Q (Continuing) — that stores handle this product.

A Yes, sir, we have to handle it.

Q Mr. Blackman, are the stores to whom you sell evaporated milk, your customers, in competition with the chain stores in the City of Columbia such as Piggly Wiggly, Winn-Dixie and Colonial?

A Yes, sir.

Q Mr. Blackman, does your concern receive a 2 per cent discount on 10 days payment from the Borden Company?

A Yes, sir.

Q In your statement earlier on the record you expressed [437] that evaporated milk is a non-profit item?

A Yes, sir.

Q Now, in your determination of that fact did you also consider the 2 per cent discount as being within that profit range you were talking about?

A Yes, sir; I certainly would.

* * * *

[440]

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Blackman, did your company ever ask the Borden Company to pack a private label evaporated milk for them?

A No, sir.

[441] Q Have any of your company's customers ever asked your company to furnish them with a private label evaporated milk?

A Yes, sir.

Q Well, in that case why doesn't your company ask the Borden Company for the private label?

A Well, the reason I answered t h a t remark was there is a private label milk sold in Columbia by Thomas & Howard Grocery Company called Miss Virginia and some of our customers are buying from them now and wondered why they couldn't buy it from us. This has been quite recently.

Q Yes, but my question is why if you h a v e had those inquiries from your customers, why haven't you asked Borden to pack a private label for you?

A Frankly, personally I didn't k n o w Borden packed it for them. I didn't know who packed it.

Q Have you inquired of any other packer of evaporated milk for a private label?

A No, sir.

Q There are others who pack it, are there not?

A I presume so.

Q As a matter of fact, t h e r e are private labels packed by producers other t h a n Borden being sold right here in Columbia, are there not?

A Well, I don't know about that.

[442] Q Mr. Blackman, does your company handle Pet and Carnation evaporated milk?

A Yes, sir.

Q Do you resell those at the same price at which you resell the Borden brand of evaporated milk?

A That is right, we have the same price on all three brands.

Q Those are the three advertised brands?

A That is right.

Q Well known in the trade?

A That is right.

Q You mentioned, I believe, you have been with your company nine years? Has there been any time during that nine years when your company has sold any of those brands at different prices or have they at all times sold the three brands at the same price?

A We have always had the same price on all three.

Q Has that been customary in the wholesale trade generally to your knowledge?

A Yes, sir.

Q Mr. Blackman, you mentioned several other wholesale grocers here in Columbia with whom you consider that your company is in competition, those included I believe among others the Merchants Distributing Company, the Hartley Company, and the Geiger Flour Company?

[443] A That is right.

Q Do you have any information to the effect that any of those companies I have just named are selling in Columbia in a private label evaporated milk packed by Borden?

A I didn't know who packed milk. The Thomas & Howard has one called Miss Virginia and Pigley Wigley have their own private brand; I don't know who packs it. There has been some milk sold to a retail store here in Columbia called the Barn and the name on it is Big Barn, I don't know who packs that.

Q The three companies that I named, that is Merchants, Hartley and Geiger, do any of them to your knowledge sell any private label?

A Not that I know of.

Q You mentioned, Mr. Blackman, that you consider that your company is in competition with Pigley

Wigley. Am I correct in my understanding that Pigley Wigley is a cooperative organization?

A That is right. I mean our customers are in competition, the people we sell are in competition with Pigley Wigley.

Q With the retail stores run by Pigley Wigley?

A Yes, sir.

Q Thank you, sir.

Does your company sell evaporated milk to the Red and White Stores here?

[444] A We sell evaporated milk to them; yes, sir.

Q Do you sell to that group generally or just to a few stores here in town?

A Well, to a few stores. It happens that I personally have some friends who own Red and White Stores, three of my best customers are Red and White Stores. They have a private brand, too, Red and White milk, they get from Thomas & Howard; I don't know who packs that.

Q Mr. Blackman, you mentioned that you handle evaporated milk as an accommodation matter. Has that generally been true during the years you have been with your company?

A Yes.

Q You mentioned, Mr. Blackman, that if you had been approached about a private label evaporated milk at a cheaper price you would have wanted to take it on and that you would have resold it for a cheaper price than the price at which you resell the Borden brand?

A That is right.

Q I take it that it has been your experience in the trade generally that the advertised brands of evapo-

rated milk sell at higher prices than these private label brands?

A That is right; yes, sir.

Q That's true at the retail level and at the wholesale level generally?

A Well, I can't answer the wholesale level on private brand because we don't have any, but that is true at the retail [445] level.

Q Is there a distinction of that kind, Mr. Blackman, as between an advertised brand of merchandise and a private label? Does that same kind of distinction run generally through the grocery business?

A Yes, sir.

Q That the advertised brand sells for more?

A They sell for more and sell better.

Q I didn't get your last word, sir.

A Sell better.

Q Better?

A Yes, sir.

Q How do you account for that, Mr. Blackman?

A People are going into a grocery store to pick up groceries, the majority of the people buy something that is advertised that they have known for years or heard of for years or see highly advertised. They know it is a good product, they know it is fancy merchandise or best quality.

Q Know it has got a good company behind it?

A That is right, got a good company behind it.

Q A great many people will insist on having those advertised brands, is that right?

A That is right. And there are a lot of other people looking for price items.

Q That is right, some people shop price and some people [446] shop brands, is that right?

A Yes, sir; that is right.

Q Mr. Blackman, this computation that you brought along with you which is now Commission's Exhibit 2231, goes back I believe, to the beginning of the year 1956. Is that correct, sir?

A That is right.

Q Mr. Blackman, I would like the record here to show some information about your volume of Borden brand evaporated milk in earlier years and I assume you don't have such figures with you, is that correct, sir?

A No, sir, I do not.

Q I do have here, Mr. Blackman, some figures that were prepared from the Borden Company's records as to the sales to your company. These figures show that in the year 1957, calendar year, your company's purchases were very substantially higher than they had been in previous years in that in 1957 you purchased 1122 cases of the Borden brand evaporated milk, that includes both smalls and tall converted to a tall case basis.

Going back into earlier years, 1956, the purchases were 962 cases; 1955, 886 cases; 1954, 308; 1953, 284; 1952, 300; 1951, 241.

Mr. Blackman, do those figures sound substantially correct to you as far as you can recollect?

A They sound like they would be.

Q In other words, you do agree that while you haven't got [447] the precise figures that your purchases, particularly in the year 1957, were substantial-

ly higher than they had been for many years before that?

A Oh, yes. Our business has grown, our business has grown tremendously the nine years I have been there. It's grown, I would say, 400 percent.

Q Is it still growing?

A Still growing. Although I noticed in my figures here, it kind of surprised me, our sales on Borden's milk have dropped off this year. I didn't realize that myself until I looked at those figures. Although our sales on other brands haven't.

Q When you say "other brands"?

A Pet and Carnation.

Q Pet and Carnation sales have held up?

A Held up.

Q Have they any more than held up this year?

A No, sir; I don't know why, I can't answer that question.

Q But Pet and Carnation have held up and Borden has been off to whatever extent these figures show, is that correct?

A That is right.

MR. LUKINGBEAL:

That is all, sir.

* * * *

[449] Thereupon,

WOODROW W. POWER

was called as a witness for the Commission and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Power, would you give your full name and home address for the record, please?

A Woodrow W. Power, 4119 Round Top Road.

Q Columbia?

A Columbia.

Q In what type of business are you engaged?

A Retail grocery.

Q And what is the name of your store?

A Power Food Store, Inc.

[450] Q Where is it located?

A 2801 Devine Street.

Q Is that your sole store at the present time?

A Yes, sir.

Q And what position do you occupy in the store?
What is your title?

A Well, I own it and manage it and operate it.

Q What other grocery stores are located in the immediate vicinity of your grocery store? Could you give us the names of them?

A A&P, Pigley Wigley, Winn-Dixie, and Colonial.

Q Are you in competition for customers with these concerns?

A Yes, sir. There is a couple of independents within shopping distance there, too.

Q Mr. Power, do you handle Borden evaporated milk?

A Borden Silver Cow; yes, sir.

Q Silver Cow brand?

A Yes, sir.

Q From whom do you obtain Borden Silver Cow evaporated milk?

A Well, it will vary from Thomas & Howard, Merchants Wholesale and Hartley Grocery Company.

Q Do you handle the three name brand evaporated milks, for instance, Borden Silver C o w evaporated milk, Pet and Carnation?

【451】 A Yes.

Q Do you handle any o t h e r type of evaporated milk?

A Not until the past couple of weeks we have handled a different kind.

Q What kind is that?

A The exact name I wouldn't say for sure. I bought it from Thomas & Howard.

Q What price do you pay for Borden brand evaporated milk, Mr. Power?

A \$6.65.

Q At what price do you sell a case of Borden evaporated milk?

A Our shelf price is 15 cents a can. I believe that figures about \$7.20 a case.

Q About \$7.20 a case?

A Yes.

Q Do you purchase it then at \$6.65 a case and you sell it at \$7.20 a case, which I believe would be 55 cents mark-up on the case of evaporated milk?

A Yes.

Q Do you regard evaporated milk, Mr. Power, as a profit item to you?

A No, sir.

Q Why is that?

A Well, we — you have to make more than that

somewhere [452] or another in the store to stay there.

Q Well then —

A In other words, your expenses are more than the 7 or 8 percent which is about what that will figure.

Q Then, if it is not regarded by you as a profit item, Mr. Power, why do you handle it?

A Well, it is a must item. In other words, your customers want it and you just have to have it.

Q Do you find that evaporated milk is in demand by customers?

A Yes. That is an item that they all more or less shop for for a price. In other words, if you put more than that on it they want to know why you are higher.

Q Being in the retail grocery business, Mr. Power, and handling Borden brand evaporated milk, Pet and Carnation milk and this other brand which you say you obtained from Thomas & Howard, do you have them located in the same area within the store; in other words, within the same shelf area within the store?

A No, sir, Pet, Carnation and Silver Cow are all in the same location. Miss Carolina or Virginia is the name of the other one, that is in a stack in the aisle itself.

Q What price do you pay for this M i s s Virginia evaporated milk in the tall variety?

A I wouldn't say the exact price right now. I don't believe [453] I can say and be sure exactly what it was.

Q Would you say that those various brand evaporated milks are in competition with one another for sale to your customers? In other words, when your customer is going through the store she is we'll assume purchasing evaporated m i l k. Now, have you

found within your experience that that milk is in competition with one another for the sale to that customer?

A Some of them — do you mean by that whether some of them buy and some of them won't?

Q That is right.

A In other words, to some women a can of milk is a can of milk and some of them they want a particular brand on it.

Q That is right, but the sale of evaporated milk of one brand is in competition with another brand?

A Yes.

Q Now, you say you sell evaporated milk at \$7.20 for the case?

A Yes.

Q Do you ever, if a person purchases a case lot —

A We add 10 cents a case to it.

Q You add 10 cents a case?

A In other words, if a woman is in shopping for groceries and got a new baby, "I have got to have a case of milk. What will you sell me a case of milk for?"

We add ten cents a case to it.

[454] Q Now, you mentioned a short while ago, Mr. Power, you are in competition with various other stores in your vicinity like Pigley Wigley, A&P, Colonial and the like. Now, I assume that you follow their sales advertising policies and their merchandising policies?

A Yes.

Q Have you found them advertising private label milk at a price less than that charged by you for brand label?

A Yes.

Q Or for any evaporated milk which you handle?

A Yes.

Q Have you found that you could meet that price that is charged by them?

A No, sir, I can't buy it that cheap.

Q Well, if you were able to obtain the private label evaporated milk from Hartley or Merchants at a price say of \$5.25, \$5.30, would you be interested in it?

A Yes.

MR. LUKINGBEAL:

I object to that question, your Honor. There is no basis in the record for a suggestion that Hartley or Merchants or anybody else would resell to the retailer at \$5 or \$5.25. There is nothing in the record on the subject at all.

MR. COUGHLIN:

The reason I asked that question is using — I have used the normal mark-up made by the Hartley [455] Grocery Corporation and by Rawl in the sale of their evaporated milk as a basis for the figure that I have used in asking the question of this witness. Now I realize, your Honor, it is an approximation, but I contend also that it is a reasonable approximation which is not really that material. Actually, there could be a latitude of perhaps five or ten cents.

HEARING EXAMINER LIPSCOMB:

Your question will be permitted. Its strength and its force, of course, will depend upon the reality with the rest of the facts in the record.

By Mr. Coughlin:

Q Do you remember the question, Mr. Power?

A You asked would I buy a private label milk and say \$5.25 or something like that.

Q Yes.

MR. LUKINGBEAL:

I want to object to this question on another ground if your Honor will permit me. This witness has already been asked what he is paying for the private label milk he is now buying. And it seems to me that since there are available to this witness actual facts there is no occasion for any of the hypothetical assumption sort of approach involved in Mr. Coughlin's question.

HEARING EXAMINER LIPSCOMB:

That sounds rather persuasive to me, Mr. Coughlin. What do you think?

[456] MR. COUGHLIN:

Well, your Honor, of course if Mr. Power is paying the figure stated for Miss Virginia evaporated milk he was not able to give a figure, I believe, for what he is paying Thomas & Howard on its Miss Virginia milk so I have no figure to use from that.

HEARING EXAMINER LIPSCOMB:

I see.

MR. COUGHLIN:

I have had to take a reasonable approximation which I can tell your Honor is reasonable under the circumstances.

HEARING EXAMINER LIPSCOMB:

Proceed.

By Mr. Coughlin:

Q Going back to that question again, Mr. Power, if you were able to obtain a private label evaporated milk from Hartley or Rawl, at such a price would you be receptive to that?

A Yes.

Q What is that, sir?

A Well, in other words, if a milk is advertised — if the chain stores are advertising a tall can of milk some for say like last week — I believe it was last week they advertised 10 cents a can. The nearest I could buy one to sell for 10 cents a can, if I could buy one to sell for that I would be happy.

Q So, in other words, Mr. Power, you would be receptive to the purchase of private label evaporated milk at the price I [457] quoted or in the vicinity of the price I quoted?

A Yes.

Q In order to enable you to sell this evaporated milk in competition with those stores in your vicinity selling evaporated milk at, say, ten cents a can?

A Yes.

Q Which you say you cannot meet at the present time?

A Yes.

MR. LUKINGBEAL:

Your Honor, I move to strike all this testimony. We have a man here who is actually selling private label, buying it from somebody for some price. We are now posing serious questions where the only suggestion you

can draw from it is that if he could buy it for \$5.2 and then turn around and sell it for 10 cents a can which is \$.80, that is now construed as meeting competition.

It seems to me, your Honor, this witness is right here in town. He can go out and pick up the phone and call his store or he can go over there, find out what he is paying for his milk and come back and testify about facts and not a lot of hypotheticals here.

By Mr. Coughlin:

Q Mr. Power, how long have you been buying Miss Virginia?

A I bought one order from them here about a week or ten days ago.

Q That is the first order?

[458] A Yes.

Q Now, prior to a week ago — excuse me, your Honor.

I would like to preface my question this way: The questions which I have directed to the witness I would like to have the court regard as being for that period prior to a week ago when he began purchasing this Miss Virginia. The price at which Mr. Power does not know.

MR. LUKINGBEAL:

Your Honor, I don't think they can pick and choose

HEARING EXAMINER LIPSCOMB:

We will strike all the testimony relative to the price of private brand.

You start over again.

By Mr. Coughlin:

Q Between the period January 1956 through March 1958, Mr. Power, were you able to obtain or did you handle a private label evaporated milk?

A No, sir.

MR. LUKINGBEAL:

Your Honor, I object to the question was he able to obtain. There is no foundation for the suggestion that he ever asked anybody.

By Mr. Coughlin:

Q I will direct the witness to answer whether you had requested of any wholesale grocer or anyone to furnish you with a private label evaporated milk?

A No, sir.

[459] Q But had that offer ever been made to you?

A No, sir.

Q During that period, Mr. Power, would you have been receptive, say in March of 1958, to being able to purchase a private label evaporated milk at around \$5.25 or \$5.30?

A Yes, sir.

Q And for what reason?

A Well, when you buy a case of milk for \$5.50 and if you're paying \$6.65, that is enough difference to help you with trying to meet — changing the shelf price, there is the difference in there.

Q In other words, you would be able to offer evaporated milk at a retail price less than that which you charge for your so-called name brands?

A Yes.

Q And then I would ask you again, Mr. Power, why

would you desire to do this? To offer this evaporated milk at a price less?

A To compete with the major grocery stores.

MR. COUGHLIN:

Just for clarification purposes I would like to ask Mr. Lukingbeal as to what part of the testimony requested be stricken?

HEARING EXAMINER LIPSCOMB:

The point dealing with the private brand that he recently purchased; that testimony.

[460] MR. COUGHLIN:

Yes, sir.

That is all I have — excuse me.

By Mr. Coughlin:

Q Mr. Power, did you prepare any information regarding or were you able to prepare any information regarding your purchases of Borden evaporated milk over the last three-year period?

A By that you mean how much Borden Silver Condensed milk I buy in the last —

Q You bought in the last three years separately each year. Excuse me, before you answer: Is that a document form or is that a notation you made from your own records?

A Notation.

Q Would you recite that for the record, please?

A In other words, I averaged selling about just a little over 1 case a week, an average of one case a week of the tall size and about one case about every four weeks of the small size.

Q How long have you been averaging this?

A The last three years, '56, '57, and '58.

Q One case a week of tall?

A Yes.

Q And about the same quantity for small?

A No, one case every four weeks of the small.

Q One case every four weeks of the small?

[461] A That is right.

MR. COUGHLIN:

That is all, your Honor.

MR. LUKINGBEAL:

May we have a very short recess, your Honor?

HEARING EXAMINER LIPSCOMB:

Short recess.

(A short recess was taken.)

HEARING EXAMINER LIPSCOMB:

The hearing will be in order.

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Power, you mentioned at the outset of your testimony that you handled the three advertised brands of evaporated milk and that also very recently you have taken on a private label?

A A Cheaper milk, Miss Wisconsin or Miss Carolina, something like that.

Q Maybe Miss Virginia, I think you mentioned once.

A Something like that.

Q It is one of the states, anyway?

A Something like that.

Q You mentioned that you are reselling the advertised brands at 15 cents a can?

A Yes.

Q At least my notes don't indicate that you ever mentioned what you're reselling this other one, whatever state name it has, [462] what is your shelf price on that?

A Two for 25.

Q Two for?

A Twenty-five.

Q Twenty-five, I see.

Well now, Mr. Coughlin then took you back before March 1958 and asked you if somebody had approached you about a private label selling for I think he said something around \$5.25 a case to you, whether you would have been interested and you said you would in order to meet the competition. Back in March what was the price of the people you consider your competitors on private label evaporated milk? The price to the consumer?

A It has been around 10 to 12 cents or 12-1/2 cents for cheaper line of milk for the last I'd say a year, even maybe more.

Q I see, around 10 to 12 and 12-1/2 cents?

A That is right.

Q That has been so far as you know generally the case here in Columbia?

A Yes, sir.

Q Well now, to stick with Mr. Coughlin's hypothetical figures if you paid \$5.25 for a case of private label milk and then sold it for 10 cents a can, 48 cans in a case, you would have to lose a good deal of money to do that, wouldn't you?

[463] A I would have to lose thirty cents or something.

Q Is it your practice to sell items in your store at a loss?

A At times I do; yes, sir.

Q Loss leaders?

A Well, at times we sell merchandise for less than we pay for it on some items; yes, sir.

Q Continuously?

A Just for weekend.

Q These 10 cent prices you had to meet were not weekend prices, were they?

A Well, they have been selling it for — some of the major chains have been advertising milk for 10 cents for several weeks now, right here in town.

Q That is right.

A In other words, whether it is every day in the week or not I couldn't say. I see it in their ads and on their windows.

Q Mr. Power, you would expect any wholesaler, wholesale grocer who sold you a private label evaporated milk to make a little profit on it, wouldn't you?

A Yes.

Q You wouldn't expect him to sell it to you for the same price?

A Well, I think some of them say they sell it to us at **[464]** cost, make a discount; some of them say

they make a dime a case on it. I don't know what they make on it.

Q On private label?

A No, just milk.

Q You haven't heard any of these wholesalers tell you they like private label because they c a n make more money on that than they can make on the advertised brands?

A No, sir.

Q If they do make more money on that that has to come out of the retailer, doesn't it?

A It may come out of their manufacturer's wealth.

Q You still don't recollect what you are paying for that private label you are buying now?

A If I am not mistaken we paid \$6.65 for the Carnation and if I am not mistaken this other was 35 cents a case less.

Q So you think you are paying \$6.30?

A So the exact price I couldn't t e l l you. \$6.25 or \$6.30 is what I think he is charging me for it.

Q Mr. Power, you described the location on your shelves in your store of the different kinds of evaporated milk that you sell and you said that you have the three name brands at one spot and then off somewhere else you have this off b r a n d, whatever state name it is. You also referred to some customers as shopping brands or words to that effect. What do you mean by that, Mr. Power?

[465] A Some people say t h e y want Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Car-

nation, and some of them don't want anything except Pet.

Q They don't care what price —

A If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else.

Q You couldn't give her something else, could you?

A I doubt if I could.

MR. LUKINGBEAL:

That is all, sir.

MR. COUGHLIN:

I have only one question, your Honor.

REDIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Power, also in the conduct of your retail grocery business have you found that many of your customers are price conscious?

A Yes, sir.

MR. COUGHLIN:

That is all.

* * * *

[466] Thereupon,

DANIEL SHUMPERT

was called as a witness for the Commission and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

MR. COUGHLIN:

Your Honor, I have with me a subpena that was issued for the appearance of Mr. Shumpert.

By Mr. Coughlin:

Q Would you give your full name and address for the record, please?

A Daniel J. Shumpert.

Q What is your home address?

A 903 L Avenue, Casey.

Q Mr. Shumpert, in w h a t business are you engaged?

A Retail grocery business.

Q Under what name?

A Shumpert Foods Sales.

Q What is the address?

A 1205 C Avenue, West Columbia.

Q What position do you occupy with this concern?

A I am the owner.

Q Mr. Shumpert, what other retail grocery stores are [467] located in your immediate vicinity?

A We have another independent, Frank Hoffman and we have a Winn-Dixie and an open air market, Webbs.

Q How far from your store is the Winn-Dixie store you mentioned?

A About three blocks.

Q Are you located in a shopping a r e a, shopping center area, Mr. Shumpert?

A Yes, sir; known as Triangle City.

Q Do you operate more than one store, Mr. Shumpert?

A Just one.

Q Do you sell Borden brand evaporated milk, Mr. Shumpert?

A Yes, sir.

Q Under what label do you sell it?

A Silver Cow.

Q From whom do you obtain this milk?

A We buy it from Thomas & Howard, Merchants and J. Rawl, Rawl Distributors.

Q What price do you pay for Borden Silver Cow evaporated milk, the tall can?

A \$6.65.

Q And at what price do you sell a case of Borden brand evaporated milk?

A We sell it for three for 43.

MR. LUKINGBEAL:

Your Honor, perhaps to avoid the [468] kind of time problems we have had before, I should object to this question on the ground it ought to be related back to the time before March 31, 1958.

By Mr. Coughlin:

Q Then, excuse me.

Mr. Shumpert, were you paying the same price for Borden evaporated milk in March of 1958 that you are paying at the present time?

A Yes, sir, it has been this price now for a year or better.

Q And your mark-up on this evaporated milk has been the same also or was the same in March as it is at the present time?

A Yes, sir.

Q So if my computations are correct, based upon the mark-up t h a t you made on the case of Borden brand evaporated milk in March of 1958 it would be \$6.88 a case. That would be 23 cents a case differential in price.

Now, Mr. Shumpert, do you regard evaporated milk as a profit item?

A No, sir; no indeed not.

Q Why do you say that, Mr. Shumpert?

A We don't make any money off of milk. It is an item that we must carry.

Q Would you elaborate on that? It is a what?

[469] A Used for a leader.

Q Would you elaborate a little more on what you mean by it is used for a leader?

A Well, it is something that every home must have.

Q So, then you mean that you carry this product in your store as an accommodation to your customers but not as a profit item to you in its sale?

A Right.

Q Do you handle any other type evaporated milk than that produced by the three principal milk concerns of Borden, Pet and Carnation?

A We have a brand Miss Virginia.

Q From whom do you obtain this brand, Mr. Shumpert?

A Thomas & Howard.

MR. LUKINGBEAL:

If your Honor please, I object. We are asking in the present tense.

MR. COUGHLIN:

If I may carry this out a minute further, Mr. Lukingbeal, I will place it at a time period.

By Mr. Coughlin:

Q Mr. Shumpert, how long have you been obtaining this product, Miss Virginia, approximately?

A It has been between a year and a year and a half.

Q Using a year and a half then that would place us at approximately June of 1957?

A Yes.

[470] Q And if that is the case, Mr. Shumpert, would you answer this: Did you handle a private label evaporated milk between January of 1956 and June of 1957?

A I believe not, sir.

Q Mr. Shumpert, going back to June of 1957, is it within your recollection that competing stores of yours within your area were in a position to sell evaporated milk or were selling evaporated milk at less than the price charged by you?

A We have had that at different times. We haven't had it in the last six or eight months that I am sure of. But we have had it at times that they would be selling milk — yes, they have recently sold milk below cost or what I had to pay for it. But in return we have done the same. We have met competition on it at 10 cents a can on this Miss Virginia.

Q Through Miss Virginia in March of 1958 you were able to sell this label evaporated milk at 10 cents a can to meet the competition of those —

A Not without losing money on it; no, sir.

Q But you did sell it at that price?

A We have sold it at that price; yes, sir.

Q I am going back now to June of 1957, Mr. Shumpert and I would like to know whether at that time other retail grocery stores were selling evaporated milk at a price less than that charged by you?

MR. LUKINGBEAL:

I object, your Honor. I think that [471] the question is ambiguous because the witness has spoken of June '57 as when he took on the Miss Virginia; it seems to me unless this question makes it clear whether we are talking about the time he took it on or after.

MR. COUGHLIN:

I am talking about the time before Mr. Shumpert began handling private label milk known as Miss Virginia, and I direct my question solely to that period; for convenience sake I will use May or sometime in June of 1957, prior to your beginning to handle Miss Virginia evaporated milk.

By Mr. Coughlin:

Q And at that time, were any stores in your area selling evaporated milk at less than you were selling evaporated milk?

A Yes, sir.

MR. COUGHLIN:
Off the record?

HEARING EXAMINER LIPSCOMB:
Off the record.
(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:
On the record.

By Mr. Coughlin:

Q Now, pursuant to a conversation I had with respondent's counsel, it is understood that at that time of around June 1957 a price to a wholesale grocer for the sale of Borden evaporated milk was \$6.45 a case. Do you remember what your mark-up was or what your cost was for a case of evaporated [472] milk at that time from the Borden Company?

A No, sir, I don't remember.

Q Well, would you say, Mr. Shumpert, that if the wholesale grocer's mark-up to you at that time — in other words, were you paying perhaps 5 cents or 10 cents a case more at that time for the evaporated milk than the price I quoted to you of \$6.45 which was the price from Borden to a wholesale grocer or to a direct customer?

MR. LUKINGBEAL:

Your Honor, I object to that. The witness said he didn't know. Now he is trying to suggest to him what it was.

I stipulated that it would be all right to state to the witness what the record, in fact, shows, as to what Borden's price to wholesalers was at that time, but putting words in the witness' mouth now —

HEARING EXAMINER LIPSCOMB:

The objection is sustained.

MR. COUGHLIN:

I will retract that and deal solely with private label variety of evaporated milk.

By Mr. Coughlin:

Q Going back to the period prior to the time you began to handle Miss Virginia, would you have been receptive to the purchase of a private label evaporated milk from any of your wholesale grocery companies at a price of approximately \$5.10?

[473] A Oh, yes, certainly.

Q In other words, then you would — what price range in that vicinity would you have considered it worth while or be receptive to the purchase of private label evaporated milk?

A You mean how much lower?

Q Yes.

A Any amount, a nickel, a dime or anything would have been of help; any amount would have helped.

Q Why do you say a nickel or a dime would have been of help? In other words, any differential of a cost of a nickel or a dime for a private label.

A It puts me in position to meet competition prices more. The lower I can buy the cheaper I can sell it.

Q So, would you regard the sale of a private label as a profit item? Would that be your determination or your standard for determining whether you should or not buy a private label at five or ten cents differential which you stated? In other words, would profit be the primary consideration or would it be to meet competition of your competitors?

A Competition would be my main object, meeting competition.

Q You mentioned a short while ago, Mr. Shumpert, that you regard evaporated milk as being a lead item?

A Yes, sir.

Q Do you feel that in being a lead item that the gaining or losing of customers can depend upon your handling of that [474] product?

A Yes.

Q Then, if I understand you correctly from your prior testimony you stated that you would be receptive to buying a private label evaporated milk at a five to ten cents differential in order to meet competition on this lead item, is that correct?

A Any amount. The point I was trying to bring out a nickel or a dime a case would certainly draw my attention to it, yes, yes indeed.

* * *

[475] Q I would like to have you examine this document identified as Commission's Exhibit 2232 and ask you whether under the paragraph No. 2 this might refresh your recollection as far as when you began purchasing Miss Virginia (handing document to the witness)?

Or is that accurate or is that an error?

* * * *

THE WITNESS:

I am not sure about this. My bookkeeper fixed it up and I signed it.

* * * *

[476] Q It should be June 1957 and the price paid between June 1957 and August 4, 1958, was \$5.85 less 15 cents per case or \$5.70 net?

A Yes.

Q And thereafter, the price on August 4, 1958, date is \$5.97 less 15 cents per case, is that correct?

A Yes, sir.

* * * *

[477] Q Now, Mr. Shumpert, do you find that in the retail sale of evaporated milk in your store that there is competition between the various brands sold by you in evaporated milk?

A Yes, sir.

Q Do you find that many of your customers are price conscious in what they are buying?

A Definitely.

MR. COUGHLIN:

That is all I have for now, your Honor.

HEARING EXAMINER LIPSCOMB:

Do you wish a recess?

MR. LUKINGBEAL:

Very, very brief, your Honor, but I think that is the quickest way to dispose of it.

【478】 HEARING EXAMINER LIPSCOMB:

All right.

(A short recess was taken.)

HEARING EXAMINER LIPSCOMB:

All right, the hearing will be in order.

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Shumpert, would you agree with me that you are known as one of the price leaders in the grocery retail field in your area?

A I suppose you could say that; yes, sir.

Q You run 10 cent evaporated milk even when others don't sometimes, don't you?

A Vice versa.

Q Mr. Shumpert, going back to June 1957 when you testified that you first started to sell the Miss Virginia evaporated milk, prior to that time were you selling any evaporated milk other than the three advertised brands, the Borden, Pet and Carnation?

A Yes, before that time we sold Armour's milk.

Q Armour's evaporated milk?

A Yes.

Q Did you sell Armour's out of your store at the same price that you were then selling the three advertised brands?

A No, I bought their milk cheaper than the three advertised brands. I don't recall now how much cheaper, but I do know [479] that it was some cheaper. Just as Miss Virginia milk is cheaper to us now than the three leading brands.

Q And you sold the Armour out of your store cheaper than you sold the other three, I take it?

A Yes, sir.

Q Well now, at that time back before you took on the Miss Virginia in June 1957, were your competitors selling the Armour brands or what brands were they selling?

A I don't know; I am sorry.

Q Well, I had understood from your testimony that at that time your competitors were selling some evaporated milks at prices lower than you were selling the three advertised brands but you just — that is the fact, isn't it, they were selling some evaporated milk?

A Yes, and I believe at that time, I am not sure, but I believe at that time they had their own brand at that time.

Q Some of your competitors did?

A Yes, sir.

Q But you don't remember the name of the brand?

A No, sir.

Q Do you have any information that suggests that any brand of evaporated milk in this market, that is among the people you consider your competitors, prior to June 1957 was being packed by the Borden Company?

A May I have that question again, please?

[480] HEARING EXAMINER LIPSCOMB:

Will you read it, please?

(Question read.)

THE WITNESS:

I don't know.

By Mr. Lukingbeal:

Q Mr. Shumpert, you mentioned that some of your customers are very price conscious?

A Yes.

Q I suppose you also have some who are very brand conscious, don't you?

A Yes.

Q You have some people that insist on one of these brand names, right?

A Definitely; yes, sir.

Q They won't buy anything else, right?

A (Nodding Yes.)

Q Now, you mentioned, Mr. Shumpert, that for a price difference to you of five to ten cents a case or something of that order, you might be interested in taking on some different brand of evaporated milk. If you are purchasing one of the three advertised brands of evaporated milk for \$6.65 a case, somebody offers you an unknown private label for \$6.60 a case, are you going to be interested in buying that private label at that price?

A I may be. Not definitely, but may be.

[481] Q For what reason would you be interested in doing that?

A Well, as I stated awhile ago, milk is used for a leader, a drawer, and at the same time if we could make a nickel on milk we are willing to make it. We as retail grocery men don't make, haven't made any money on retail on the milk. The brand, the label would depend a lot as to whether you would take it or whether you wouldn't take it.

Q The question I asked you was with reference to an unknown private label.

A I would consider it.

Q Would you expect to be able to sell that at a profit if you paid \$6.60 a case for it?

A As I stated a few minutes ago I would more or less use it as a leader, I guess, to meet competition with it.

Q Use it for a loss leader, is that correct?

A Yes.

Q Do you recollect, Mr. Shumpert, what your retail price to your consumer was on your Miss Virginia back in the spring of this year, say in March of 1958?

A Since we have been handling Miss Virginia milk I believe we have had only two prices, 3 for 37 and 3 for 38. Other than the times we run it on a special on a dime, loss leader.

Q About how often have you been using it as a 10 cents loss leader?

A I try to use it as often as my competition uses it.

[482] Roughly I guess for the last six or eight months it has been about once a month; one weekend out of the month.

MR. LUKINGBEAL:

I see.

That is all, sir.

MR. COUGHLIN:

That is all, sir.

HEARING EXAMINER LIPSCOMB:

You are excused, sir. Thank you.

MR. LUKINGBEAL:

Your Honor, before we close the record Mr. Hays has handed me the figure that I understand he got from the first witness, Mr. Hartley, as to the sales of Borden evaporated milk by Mr. Hartley's company during the year 1955 and I understand that we are stipulating that those sales were 57 cases of the small size and 1,090 cases of the tall size.

MR. HAYS:

It is stipulated.

HEARING EXAMINER LIPSCOMB:

So recognized.

* * * *

【486】 Thereupon,

HAMPTON SOX CAUGHMAN

was called as a witness for and on behalf of the Commission and being then and there duly sworn was examined and testified as follows:

【487】 DIRECT EXAMINATION

By Mr. Coughlin:

Q Would you state your name and address, home address, for the record, please.

A Hampton Sox Caughman, Route 4, Lexington, South Carolina.

Q In what business are you engaged, Mr. Caughman?

A Retail grocery.

Q What is the name?

A Frye and Caughman Grocery.

Q Where is that located?

A West Clemson.

Q Is that located in the same shopping areas as that of Mr. Shumpert?

A Yes, sir.

Q What is the name of the center?

A Triangle City.

Q Do you have more than one store?

A No, sir; just one store.

Q What other stores are within your immediate vicinity which are also retail grocery stores?

A We have Piggly Wiggly, Red and White, Winn-Dixie and Colonial.

Q Approximately how far are each of those stores from your location?

A Red and White is one block; Piggly Wiggly approximately **【488】** five blocks; Winn-Dixie about three blocks; and Colonial I'd say about twelve blocks.

Q Do you engage in the retail sale of canned evaporated milk, Mr. Caughman?

A Yes, sir.

Q Do you sell Borden brand evaporated milk?

A Yes, sir.

Q Under what label is that sold?

A Under the Borden label.

Q Which is Silver Cow?

A Silver Cow; yes, sir.

Q From whom do you obtain Silver Cow evaporated milk? Who do you buy it from?

A From Hartley Grocery.

Q What is the price that you paid in March of 1958 for this evaporated milk from Hartley?

A Six dollars and sixty-five cents I believe it is, sir.

Q At what price did you in March of 1958 sell a case of Borden brand Silver Cow evaporated milk, the tall variety?

A The full case?

Q Yes, sir; the full case price, not the entire case to one customer but at what price would a case be sold on mark-up?

A The percentage of mark-up?

Q No, I mean what price did you charge for a can of [489] evaporated milk?

A Two for 31.

Q Two for 31?

A Yes, sir.

Q Would that come out to approximately \$7.44?

A Approximately, yes, sir.

Q Mr. Caughman, is —

MR. LUKINGBEAL:

Just a second. What did your mathematics come out to?

MR. COUGHLIN :
Off the record.

HEARING EXAMINER LIPSCOMB:
Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:
On the record.

By Mr. Coughlin:

Q Mr. Caughman, do you regard the sale of canned evaporated milk as a profit item?

A No, sir.

Q What is your reason for handling canned evaporated milk?

A One of the necessary items in the grocery store that you have to handle with a small amount of profit.

Q A small amount of profit now?

A Yes.

Q Do you mean there is any profit involved in the sale of your evaporated milk?

A Well, approximately 8 percent on canned milk where you [490] try to make 20 percent on some of the other staple items, then you also have other staple items that you make less than 8 percent on.

Q Will you explain more fully, please, what you mean by 8 percent on canned evaporated milk?

A That is about your net profit, I believe. I believe we figured about 8 percent gross profit rather.

Q Gross profit?

A Gross profit.

Q Now, the gross profit, is that determined before costs of overhead and handling are deducted?

A Yes, sir.

Q Well, using the 8 percent on canned evaporated milk as gross profit, after the deduction of your handling and overhead costs what percentage consists of net profit to you?

A We net about 3 percent, sir. Three to 3-1/2 percent.

Q Do you handle a private label evaporated milk, Mr. Caughman?

A Miss Virginia is the only thing, sir.

Q From whom do you obtain Miss Virginia?

A Thomas and Howard.

Q How long have you purchased Miss Virginia?

A Approximately six months.

Q So that would mean in July of 1958 you began to purchase Miss Virginia evaporated milk, or around that time?

[491] A Around that time; yes, sir.

Q Had you handled a private label evaporated milk between January 1956 and March or the end of March of 1958?

A No, sir.

Q In March of 1958, Mr. Caughman, I believe you stated you were p a y i n g \$6.65 per case for Borden brand evaporated milk. Is that correct?

A Yes, sir.

Q In March of 1958 if you had been able to obtain a private label evaporated milk at a price of \$5 to \$5.20 —

MR. LUKINGBEAL:

(Interposing) I object to this, Mr. Coughlin, there is nothing in the record that suggests he was not able to obtain it.

MR. COUGHLIN:

Excuse me, I will lay that foundation.

By Mr. Coughlin:

Q Mr. Caughman, during the period January 1956 through March 1958 have you been offered a private label evaporated milk?

A I had been offered Miss Virginia.

Q When were you offered Miss Virginia?

A I couldn't tell you the definite time because the condition of my store — I'm limited to space.

Q I see.

A And I had remodeled along about that time and I made more room.

【492】 Q I see.

A And I was able to put in another brand of milk.

Q First of all, you say that you had been offered Miss Virginia at some time in 1958 prior to July when you actually began to handle it?

A Yes.

MR. LUKINGBEAL:

May I have Mr. Coughlin's preceding question read back, the one to which the witness gave his answer?

HEARING EXAMINER LIPSCOMB:

Yes.

(The reporter read the record as requested.)

By Mr. Coughlin:

Q Now, again, restating that question, prior to July 1958 when you actually began to handle Miss Virginia evaporated milk you stated that you had been offered Miss Virginia private label. Do you remember whether that was in 1958 that this offer had been made? The early part of 1958 prior to July?

MR. LUKINGBEAL:

He said he didn't know, your Honor.

THE WITNESS:

I couldn't answer that definitely because the salesman for Thomas and Howard had offered me the milk but I stated prior I didn't have room to put it.

MR. COUGHLIN:

Your Honor, if I may, prior to continuing questioning Mr. Caughman, I believe that I am entitled to attempt to suggest to him or refresh his recollection [493] as to a possible date whether it be in 1957 or 1958. If he understands that I would give a latitude of an entire year or six month period and he could say within that time whether he had had the offer made to him or not I think that is perfectly competent for him to answer that.

HEARING EXAMINER LIPSCOMB:

You may proceed.

MR. COUGHLIN:

Thank you.

By Mr. Coughlin:

Q Well, do you remember if it was made prior to January 1958?

MR. LUKINGBEAL:

Your Honor, it seems to me the witness has mentioned, if I understood him correctly, he said he was offered the private label several times. If that is what we are directing this to —

MR. COUGHLIN:

I am trying to ascertain, Mr. Lukingbeal, whether that first time was in 1958 or 1957, regardless of any subsequent times it was offered.

THE WITNESS:

I couldn't answer t h a t truthfully because I don't know.

By Mr. Coughlin:

Q All right.

A It was shortly after Thomas-Howard began handling Miss Virginia milk.

What year that was in I don't know.

Q Again, Mr. Caughman, would you repeat for the record [494] your reason for refusing Miss Virginia prior to the time you began to handle it?

A Inadequate display.

Q Inadequate display area?

A Yes.

Q In other words, you had enlarged your store which enabled you to handle Miss Virginia?

A Right, sir.

Q Do you know, Mr. Caughman, what you have been paying for a case of Miss Virginia, tall, since you have began handling it in July of this year?

A \$5.90 less 15 cents a case.

Q If I understand you correctly, Mr. Caughman, you do not remember the exact date at which the initial offer was made to you by Thomas and Howard for Miss Virginia milk?

A I do not.

Q Do you remember what price was offered to you for Miss Virginia evaporated milk?

A I believe it was about 10 cents less than what the price is now.

Q In March of 1958 when you were paying \$6.65 a case for Borden brand evaporated milk would you have been receptive to the purchase of a private label milk, the cost or the differential price of which was greater than the 10 cents at which Miss Virginia was offered? Do you understand my [495] question?

MR. LUKINGBEAL:

Your Honor, I object to that question. The witness has already said he did not have space for it.

MR. COUGHLIN:

I am attempting to ascertain whether the witness would have found space if the price had been more than 10 cents differential.

HEARING EXAMINER LIPSCOMB:

He may answer.

By Mr. Coughlin:

Q If you had been able, Mr. Caughman, to purchase a private label brand evaporated milk at, say, \$5.20 a case, would you have been interested in doing so?

A Yes, sir.

Q If that offer had been made to you would you have taken it?

A Yes, sir.

MR. LUKINGBEAL:

I move to strike that, your Honor; there is no evidence of any nature in this record of any private label packed by the Borden Company being offered to any retailer by any wholesaler for any price like that.

MR. COUGHLIN:

Would you repeat that again, please?

(The reporter read the statement requested.)

MR. COUGHLIN:

Well, your Honor, in answer to that we have not contended at all that a wholesaler has offered evaporated milk at this price to a retailer, but [496] rather this evaporated milk has been offered by the Borden Company to a wholesaler at that price or to a chain store.

Now, your Honor, we are simply contending that, or attempting to ascertain whether with the normal mark-up of, say, 10 to 15 cents a case that has been made by Rawl and by Hartley, I use that as a reason-

able approximation, whether this witness, like other retail witnesses, would have been interested in obtaining this milk at that price.

HEARING EXAMINER LIPSCOMB:
You may answer it, sir.

THE WITNESS:
Yes, I think I have answered that. Yes, sir.

By Mr. Coughlin:
Q Do you find in your retail operation, Mr. Caughman, that there is competition in the sale of one brand evaporated milk against another brand evaporated milk, regardless of what it may have on it, it may say "X" brand or "Y" brand?
A Yes, sir.
Q Do you also find that many of your customers are price conscious?
A Yes, sir.

* * * *

[498] Q I believe you stated a short while ago, Mr. Caughman, that you do not regard the merchandising of evaporated milk as being a profit item?
A That is correct, sir.
Q And did you answer — I'm not attempting to be suggestive, I'm trying to ascertain this — you say you handle it because it is a lead item, it's required by the customer?
A Yes, sir.
Q Well, if you were able to obtain a private label evaporated milk or had been able to obtain a private

label evaporated milk in March of 1958, for what reason would you have wanted to handle the milk at that price?

A To be competitive.

MR. LUKINGBEAL:

I object, you said "that price."

MR. COUGHLIN:

The price has been already established on the record. Excuse me, I had ascertained earlier the price of \$5.20 the witness would have been interested in [499] handling private label milk. So, using that price as a basis or approximation of that price, for what reason would you like to have handled that evaporated milk under a private label?

THE WITNESS:

Mainly to be competitive with our competitors.

By Mr. Coughlin:

Q How do you mean that, if you would elaborate a little bit.

A They have a private label milk and they can undersell us.

Q Who in particular has a private label milk in your type of area?

A Piggly Wiggly, Winn-Dixie and Colonial.

Q How do you mean you would be able to compete with them?

A For the simple reason it could be bought at a cheaper price, therefore you would sell it cheaper.

Q In other words, the price at which Piggly Wiggly

or Colonial or Winn-Dixie may run their private label evaporated you can not meet?

A You can meet it without any profit. It would be a losing proposition.

Q Mr. Caughman, I am now going to show you a paper which I will have marked for identification as Commission's Exhibit 2233.

* * * *

[501] Q Now, on this sheet you have other information also. Would you read that information and inform us as to what it means?

A I purchased an average of 5 cases of tall Borden milk per week and approximately 1 case of 48 small per week.

Q How far back — is that over the course of this year?

A Yes, sir.

Q How far back does that average go in years?

A It has been about that for about two years.

Q In other words, in 1957 and 1958 —

A About the same.

Q (Continuing) — you have purchased to the present approximately 5 cases of Borden tall evaporated milk under the Silver Cow brand per week, and the same for their small can per week?

A Yes, sir.

MR. COUGHLIN:

On the record I believe my last statement was "the same for small can." I don't mean that as read by Mr. Caughman; it is 5 cases of tall and 1 case [502] of

small per week and that has been sold, is that correct, for 1957 and 1958, to the present?

THE WITNESS:

I would say approximately; yes, sir.

MR. COUGHLIN:

Thank you.

That is all I have.

MR. LUKINGBEAL:

May we have a recess, your Honor?

HEARING EXAMINER LIPSCOMB:

Short recess.

(Thereupon, a short recess was taken.)

HEARING EXAMINER LIPSCOMB:

The hearing will be in order.

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Caughman, you mentioned how many cases per week of the Borden brand you are handling but I don't have any note as to how much of the Miss Virginia you are handling generally speaking. What is your volume on that?

A I handle only tall cans of Miss Virginia which I only sell about 3 cases — average three cases of that a week.

Q Has that been about your volume per week since you have started handling it?

A Yes, sir.

Q You started handling it back in about six months ago, I believe you said. What was your out-of-store price, your price to the consumer for Miss Virginia?

A Two for 29, sir.

[503] Q Has that been true since then?

A Yes, sir.

Q Mr. Caughman, you made a very general statement to the effect that different brands of evaporated milk compete with each other. I think you also said that some of your customers are price conscious?

A Yes, sir.

Q I suppose you have some customers that you might describe as brand conscious?

A Yes, sir.

Q Some people that don't much care what the price is for one reason or another, they insist on a particular brand; is that right?

A In some items, yes, sir.

Q Including evaporated milk? I'm thinking now of the three advertised brands — Borden, Pet, Carnation — that is true as to those, is it?

A I would say true to those three brands, yes, sir.

Q To the extent that you are thinking about a customer who is quite brand conscious you wouldn't characterize Miss Virginia as being competitive with Borden's Silver Cow, Pet or Carnation, would you?

A You are comparing the quality now or what?

Q If you are thinking about it from the standpoint of the housewife who comes into your store and is very brand conscious.

[504] A Yes.

Q She wants one of the advertised brands. Think-

ing about it from the standpoint of that customer and what you are going to be able to sell her you wouldn't consider that the Miss Virginia stuff that you have on your shelves is really in competition with those advertised brands, would you?

A I would say it would be to a certain extent, sir.

Q Meaning that if you make enough of a price difference it may be competitive?

A Pardon, sir?

Q Meaning that if there was a wide enough spread in your price between the advertised brand and the private label?

A Then you would have a variation, yes, sir. If you could buy milk that you could sell 2 for 25 then I feel you would be in competition — or you would be in competition.

Q That is 2 for 25 as compared with the 2 for 31 that you charge for your Borden brand?

A Yes, sir.

Q And I assume you charge that same price for the other two advertised brands?

A Yes, sir.

Q That is about your idea of the spread?

A Yes, sir.

* * * *

[506] Q Mr. Caughman, there was a good deal of talk during your testimony about a hypothetical question about what you might have thought of an offer of private label evaporated milk for \$5.25 a case. Have you any information, Mr. Caughman, t h a t suggests that any of your competitors in this market, buying as

you do through wholesalers, are getting any private label milk for a price anywhere near \$5.25?

A I have no definite proof but I understand that's what they are paying.

* * * *

[510] Thereupon,

NEAL P. PONDER

Was called as a witness for the government and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Ponder, did you appear pursuant to a subpoena issued?

A Yes.

Q Do you have the subpoena with you?

A Yes.

Q Would you hand it to the hearing examiner, please?

(Document was handed to the Examiner.)

Mr. Ponder, would you give your full name and address for the record, please?

A Neal P. Ponder.

Q How do you spell that?

A P-o-n-d-e-r, N-e-a-l. Home address: 11-E Calhoun

[511] Towers, Greenville.

Q In what business are you engaged, Mr. Ponder?

A I am the manager of Associated Grocers, Inc. of South Carolina, retailer owned wholesale grocery.

Q Where is that located?

A Greenville, South Carolina.

Q Just exactly what does the Associated Grocers concern consist of? What do you do?

A We supply 118 retail stores. These stores are stockholders in this retailer-owned cooperative. They own the warehouse. We in turn supply our retailer members.

Q Where are these retailer members located?

A Within a radius of 70 miles of Greenville.

Q And in Greenville itself?

A Greenville County and surrounding counties.

Q What other retail grocery stores in the City of Greenville are in competition with the members of our Association?

A Well, there is the A&P Tea Company, Winn-Dixie, Colonial Stores, and several other independent retailers that are not affiliated with our group.

Q Do you buy a full line of grocery products for your retailers?

A Yes, we stock a complete assortment of staple groceries, frozen foods, feeds.

Q Do you buy Silver Cow brand evaporated milk from the [512] Borden Company?

A Yes, that is one of the brands we stock.

Q How long have you purchased this product from the Borden Company?

A Since the inception of our organization, ten, eleven years ago.

Q Mr. Ponder, at what price do you pay for Borden

brand evaporated milk or what price did you pay in February of 1958?

A \$6.60 per case.

Q For tall?

A Tall, yes; 96 small, same price.

Q And at what price did you sell a case of Borden brand evaporated milk, tall, to your customers?

A \$6.60. That is an item that we sell at cost to our members.

Q What is the specific reason for selling it at cost?

A Because it is a highly competitive item and we want to try to get a very competitive item like that to our retailers so they can be as competitive as possible in meeting competition.

Milk is an item that is footballed and sold at cost and in instances below cost. So, we want them to get it just as cheap as possible.

Q Do you then regard evaporated milk as a profit item?

[513] A No, very definitely No.

Q Then again, to explain a little further, why do you handle evaporated milk?

A Well, it is a necessity. You have got to have that because it is a demand commodity from the consumer.

Q Has the Borden company between January 1956 and the end of March 1958 offered a private label brand evaporated milk to you?

A No.

Q In February of 1958 I believe you stated you were paying \$6.60 a case for Borden brand Silver Cow, tall, evaporated milk?

A That has been the price this year.

Q If at that time a private label brand evaporated milk had been offered to you by the Borden Company at a price of around \$5.13 to \$5.25 would you have been receptive to the purchase of such milk?

A Yes.

Q And what is your reason for that?

A Well, it would have enabled us, possibly, to have had a label or a milk that we could have met chain store competition with on their private labels. I don't know the brand Dixie has, but A&P is White House; or Colonial's or Winn-Dixie's private label milk which has been used at retail considerably at ten cents. So, of course, any milk that costs \$5.25 would [514] have been much nicer to try to meet that competition with than milk costing \$6.60.

Q With regard to Colonial or Winn-Dixie, Mr. Ponder, within your own personal knowledge have those stores sold or did they sell in February of this year a private label evaporated milk at a price lower than that which you were able to meet?

A Oh, yes. Well I say, yes, I couldn't pinpoint it to February, but it is consistently — milk has consistently been used as a leader and in lots of instances a loss leader.

Q What do you mean when you say a leader and a loss leader?

A Well, a special, to attract trade we'll call it. Maybe two for a quarter, maybe a dime. Tall cans of evaporated milk have been sold for 10 cents a can, advertised for ten cents.

Q Has it been your experience, Mr. Ponder, that this lead item which you refer to has had the effect of drawing customers into your retail stores?

A Has done what?

Q Has had the effect of drawing customers i n t o your retail stores?

A Well, our retailers, unfortunately, haven't been able to advertise milk at ten cents. It is just a little below the belt to have to pay \$6.60 and that is the lowest priced milk that we have been able to buy or that has been offered to us. And I don't know that our stores have been very strong on [515] advertising milk. Of course, it has to be used at times to try to meet some of this competition. It is rough.

Q Why do you feel that your stores have not been strong in advertising milk? Is it because of the price?

A Because of the price. Selling milk for \$4.80 a case that costs \$6.60 is a pretty substantial loss, so they have to maybe try to use some other special — well, we'll use some other item to try to get around this milk situation maybe.

Q What is the retail price at which the member stores of your Association sell tall Borden evaporated milk for which you have paid \$6.60 a case?

A There isn't any established price. We can't set prices for our retailers.

Q What have you found to be the prices?

A Oh, average 15 cents; two for twenty-nine.

Q For a tall can?

A Tall, yes.

Q Mr. Ponder, pursuant to my request did you prepare certain information regarding y o u r purchases and sales, 1956 through 1958 for all products as well as purchases during that period of Borden brand evaporated milk by your Association?

A The Borden what, the purchases on Borden?

Q Borden Silver Cow evaporated milk.

A Yes.

MR. COUGHLIN:

Will you mark this as Commission's [516] Exhibit 2234?

HEARING EXAMINER LIPSCOMB:

That will be so marked.

(The document referred to was marked Commission's Exhibit 2234 for identification.)

By Mr. Coughlin:

Q Mr. Ponder, I will show you a document which has been marked Commission's Exhibit 2234 for identification and ask you to identify this document and tell me whether that is the information which you have prepared (showing document to the witness)?

A It is.

MR. COUGHLIN:

Off the record?

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

By Mr. Coughlin:

Q A few more questions, Mr. Ponder.

Have you found within your experience in the grocery business that there is competition between var-

ious labeled brands of evaporated milk regardless of the identification of a particular brand?

A Oh, yes.

Q Do you find also, Mr. Ponder, that customers of your retail grocery store members of your Association are extremely [517] price conscious?

A Yes.

MR. LUKINGBEAL:

Just a second. May I have that read back?

MR. COUGHLIN:

I will delete the "extremely".

MR. LUKINGBEAL:

I would like to have that read back.

(Question read.)

MR. LUKINGBEAL:

I will object to that, your Honor, on the ground that there is nothing in the record that shows that this witness has any familiarity with the customers of the retailer members of his Association.

HEARING EXAMINER LIPSCOMB:

What do you say to that?

THE WITNESS:

I thought you meant our customers, our members, our retailers.

MR. COUGHLIN:

I actually, your Honor, will rephrase the question

and perhaps lay a foundation on that, but I think Mr. Ponder occupies a unique position in that he is not technically a wholesale grocer as such. He is a buyer for an association comprising retail grocers and I will determine first of all whether as such he is familiar with retail merchandising in grocery stores.

By Mr. Coughlin:

Q Mr. Ponder, you heard the question, the statement that I directed to the Hearing Examiner, and I would ask you whether [518] you are personally familiar with general retail merchandising practices of your retail stores of your Association?

A Yes, because we prepare some of their advertising for them. We like to mention difference from the usual grocer. We are a part of the retail stores that are in our organization and, of course, we are very closely identified, I think, with the customer in the retail store.

Q Then, Mr. Ponder, I will again ask: Do you find that customers of your retail members are price conscious?

A Very much so.

MR. COUGHLIN:

I have no further questions.

MR. LUKINGBEAL:

May we have a short intermission?

HEARING EXAMINER LIPSCOMB:

Yes, a short recess, gentlemen.

(A short recess was taken.)

HEARING EXAMINER LIPSCOMB:

The hearing will be in order.

MR. COUGHLIN:

Your Honor, at this time I would like to offer into evidence what has been identified as Commission's Exhibit for identification No. 2234.

MR. LUKINGBEAL:

We object, your Honor, to the inclusion that it goes beyond March 31, 1958.

HEARING EXAMINER LIPSCOMB:

The objection is overruled. The exhibit is received in evidence as Commission Exhibit 2234.

【519】

(The document heretofore marked Commission's Exhibit 2234 for identification was received in evidence.)

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Ponder, is your organization the Associated Grocers affiliated in any way with the Central Grocery Retailer-owned Grocers?

A We are not members of Central Grocers.

* * * *

【521】 Q Well now, you mentioned, Mr. P o n d e r, that at some time in the past you were associated with an organization which was affiliated with what — Central Retailer-Owned Grocers?

A Yes.

Q How long ago was that, sir?

A That has been five years.

Q And could you tell us what organization that was?

A Associated Grocers Co-op of Georgia, headquarters in Atlanta.

Q Did the Central Retailer-Owned Grocers have the Sure Fine private label evaporated milk at that time?

A Yes, that was one of the private label items they had.

Q Well, am I correct, Mr. Ponder, that there are a number of other groups here in the Southeastern United States who are affiliated with Central Retailer-Owned Grocers—

A Yes, sir.

MR. COUGHLIN:

Your Honor, pardon me. I would like to object if I may to this line of questioning as not being relevant to the direct examination of this witness as far as CROG is concerned or NROG, and the prior association of Mr. Ponder with the Associated Grocers of Georgia.

MR. LUKINGBEAL:

Well, your Honor, I think it is perfectly clear what I am getting at. The main thrust of this witness' direct testimony had to do with the availability of private label evaporated milk and this witness has personally [522] been associated in the past with these other organizations which were handling private label evaporated milks and all I am trying to do here is to get

the facts on the record as to the extent to which, as known to this witness by reason of his own affiliations —

HEARING EXAMINER LIPSCOMB:

I think you are a little afield from your direct examination but your question will be permitted.

By Mr. Lukingbeal:

Q Well, Mr. Ponder, is the Associated Grocers organization in Atlanta affiliated with Central Retailer-Owned Grocers?

A I am sure they are.

Q How about the Associated Grocers in Miami?

A They are.

Q And the Central Florida Co-op?

A I don't believe they are. I am not sure; I don't think they are.

Q How about the Florida Retailer-Owned Grocers Association?

A No, I don't believe they are.

Q Mr. Ponder, has your organization ever asked the Borden Company to pack a private label evaporated milk for them?

A No.

Q Have any of the members of your Association, and by that I mean the retail stores, ever asked your Association to get a private label evaporated milk for them?

[523] A Yes, it has been discussed. It has been mentioned. They have asked couldn't we have one?

Q Well, what has your Association done in response to those requests?

A Nothing.

Q Mr. Ponder, for how many years have you yourself been engaged in business in the grocery trade generally here in the Southeastern United States?

A Oh, it's thirty years.

Q For about how many years would you say that private label evaporated milk has been on the market down in this area?

A I would say all the time I have been in the food business.

Q And there have been a number of producers of evaporated milk who have been packing private label evaporated milks sold in this area, is that right?

A Well, I couldn't say; private label packers of milk, I think, have been rather few.

Q There have been others besides Borden?

A Oh, yes.

Q Mr. Ponder, you mentioned that your Association sells the Borden brand evaporated milk to the Association's members at no mark-up; for example, when you are buying at \$6.60, you sell at \$6.60. What happens to the 2 percent [524] cash discount?

A We retain that.

Q I see.

Mr. Ponder, if I understand it correctly your Association did have a private label evaporated milk sometime in the past?

A Yes.

Q What was the name of that milk?

A I believe it was Topper.

Q Topper?

A Topper.

Q About how long ago did you have that, sir?

A That has been five years. When I came to the or-

ganization they had that and it was discontinued just very shortly after my becoming associated with this group.

Q Who packed that milk?

A Armour.

Q Why was it discontinued?

A Armour discontinued packing private label milk.

Q Did your Association at that time seek to get other private label evaporated milk packed by some other producer?

A No.

Q Why not?

A We just didn't do it, there is no reason.

MR. LUKINGBEAL:

That is all, sir.

[525] MR. COUGHLIN:

I have only a couple of questions, if I may, your Honor.

REDIRECT EXAMINATION

By Mr. Coughlin:

Q First of all I wanted to again have it brought out on the record: Did you buy from Borden directly or indirectly, Mr. Ponder?

A We buy through their broker which is direct from the representation.

* * * *

[526] I believe in answer to a question directed to you by Mr. Lukingbeal, you stated that you retain the 2 percent cash discount?

A Yes.

Q Does that 2 percent cash discount retained by you cover your handling costs of the product?

A Oh, no.

Q Now, just to clarify one other point, if I may, Mr. Ponder. I believe in answer to a question of Mr. Lukingbeal as to why you did not attempt to obtain another private label evaporated milk your answer was "No reason"?

A We had no reason.

Q Just to clarify that for my own mind, did you mean that you have no knowledge or you have no reason as to why you didn't try to obtain it?

A Well, the preparation of labels is an expensive proposition and we are just not that big to go out and try to buy labels in the quantity that would have to be purchased, that would make it an impractical arrangement for our group, particularly so at that time.

Q But to clarify this, if I may: You remember on direct **[527]** examination I quoted to you a February 1958 price of \$5.13 to \$5.25 as being a range at which perhaps a private label evaporated milk might have been offered to you?

A Yes.

Q Again, would you state for the record whether you would have been receptive to that?

A Yes, because we didn't know any such price as that was available.

MR. COUGHLIN:

That is all I have, your Honor.

MR. LUKINGBEAL:

May I ask one question?

HEARING EXAMINER LIPSCOMB:

Yes.

RECROSS EXAMINATION

Q Mr. Ponder, you testified that o t h e r retailers were selling private label evaporated milk for as low as 10 cents a can?

A Yes.

Q What did you think they were buying it for?

A Our general understanding is that private label milk was 50 cents a case less than advertised labels.

Q But you weren't interested enough, despite the fact that you were faced with that 10 cent milk at other stores, you weren't interested enough to go make any inquiries of any producer —

A No.

[528] MR. LUKINGBEAL:

That is all, sir.

* * * *

Thereupon,

! HERBERT BYRNE DRAKE, JR.

was called as a witness for the Commission and, first having been duly sworn, was examined and testified as follows?

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Drake, would you give your full name and home address?

A Herbert Brown Drake, Jr., 613 Byrd Boulevard

Q Mr. Drake, with what organization are you associated?

A Smith-Drake Company.

Q And where is that located?

A 411 Westfield Street.

Q What is the nature of the business of this concern, Mr. Drake?

A We are a wholesale grocery.

[529] Q And what position do you occupy in the concern?

A I am co-owner and vice president and treasurer.

Q Do you sell to customers in the City of Greenville?

A Yes, sir.

Q And what type of customers do you have?

A They are retail, independent retail grocers.

Q Retail what?

A Grocers.

Q Within your own knowledge, Mr. Drake, are these retail independent retail grocers in competition with

some of the larger chains as well as other grocery stores in the City of Greenville?

A Yes.

Q Could you name some of those stores if you would, please, the larger ones?

A The larger ones, A&A, Lanford Stores — you want them all in the city or —

Q Yes, primarily in the city.

Winn-Dixie?

A No, sir.

Q Colonial?

A No, sir.

Q Not in the city?

A No, sir.

Q In the surrounding area?

[530] A No, sir.

Q Mr. Drake, do you obtain Borden brand evaporated milk from the Borden Company under its Silver Cow label?

A Yes.

Q How long have you obtained this product?

A Since we have opened there.

Q How long is that?

A That is four and a half years; it will be five in June.

Q Now, directing your attention to the month of February 1958, Mr. Drake, what price did you pay for the tall can case of Silver Cow label evaporated milk?

A \$6.60.

Q At what price did you sell this case to your customers?

A \$6.65 and \$6.60 in quantities.

Q How do you mean \$6.60 in quantities? To whom

would you sell your cases of Borden brand evaporated milk at \$6.60?

A Well, say five cases or more, the people that bought five cases.

Q You mean the larger store purchases you sold at cost to you?

A That is right.

Q Then, if I understand you as far as your other sales of Borden brand evaporated milk per case you had a five cent mark-up per case, is that correct?

A That is right.

【531】 Q Mr. Drake, was that five cent mark-up a profit to you? Was it sufficient to —

A Yes.

Q How much of that five cent mark-up was consumed by your overhead or handling costs?

A Well, I guess all of it; milk and sugar and things, a number of things like that are just more or less cost-items. We carry — there is practically no profit on those items.

Q Now, Mr. Drake, with that in mind do you also receive a 2 percent discount net from the Borden Company on your purchases of evaporated milk?

A Yes.

Q When you mentioned that evaporated milk is a non-profit item are you also including in that determination the two percent discount that you realize?

MR. LUKINGBEAL:

Objection. I don't believe, sir, this witness has said it was a non-profit item. He said they didn't make much profit.

MR. COUGHLIN:

I am sorry.

By Mr. Coughlin:

Q Do you regard evaporated milk as a profit item to you in the sale of milk?

A Do you mean if it carries overhead?

Q That is right, pure profit to your concern?

A Well, I would say that the 2 percent won't carry overhead.

[532] HEARING EXAMINER LIPSCOMB:

Speak just a little louder, if you will. It is rather hard to hear.

THE WITNESS:

I would say the 2 percent does not carry the overhead.

By Mr. Coughlin:

Q Did you say that the five cents did not either?

A No, sir.

Q Did you or did you not say it?

A The five cents will not carry it either.

Q Thank you. Do you buy directly from the Borden Company, Mr. Drake?

A Yes.

Q As I understand you, evaporated milk is not regarded as a profit item. May I ask you why you handle that product?

MR. LUKINGBEAL:

I object, your Honor. I still don't think this witness

has said that it doesn't make any profit on evaporated milk.

MR. COUGHLIN:

Excuse me, your Honor, it was my understanding and I think it appears on the record that this witness did say there is no profit realized on handling of evaporated milk. I could be wrong.

HEARING EXAMINER LIPSCOMB:

Is that correct, Mr. Witness?

THE WITNESS:

I said that the profit that you make will not carry your overhead possibly on evaporated milk. It [533] is one of the items that you carry.

By Mr. Coughlin:

Q So, to pinpoint this down, if I may, including the 2 percent discount you realize from the Borden Company in your purchase of a case of Borden brand evaporated milk at \$6.60 plus the five cent mark-up you will make on certain cases of this milk which you sell to your customers, is there any amount of that differential which you can regard as pure profit to you, net profit after deducting overhead and handling costs?

A I would say no net profit.

Q Then, again, Mr. Drake, I would ask you why do you handle the product?

A Well, you have to handle milk. It is an item that you have to handle to have a complete line to be able to serve the retailer. It is an item that they have

have and we have to furnish them if we want the business.

Q Has the Borden Company in the period January 1956 through March of 1958 offered you a private label evaporated milk?

A Not to my knowledge.

Q Would you know if they had?

A Yes, sir. Mr. Smith, I checked with him and he said No.

Q If in February of 1958 the Borden Company had offered to you private label milk at a figure of \$5.13 a case to \$5.25 would you have been receptive to such an offer?

[534] A I believe that we would; yes, sir.

Q Well, why would you have been receptive, Mr. Drake? Why would you have been interested in this product at that price?

A At \$5.13?

Q \$5.13 to \$5.25 as a range.

A Well, it would give, the independent merchants — you could turn it on to him and give him milk that he could do — could run, you know, to be competitive with other stores and not lose as much as they ordinarily lose in running, say, milk for a dime.

Q Mr. Drake, pursuant to a request from me did you prepare certain information regarding your total dollar volume of purchases and sales for all products handled for each of the years 1956 through 1958 as well as the number of cases of Borden brand evaporated milk purchased by you from Borden for the years 1957 through October 1958?

A Yes, sir, approximately.

Q I will ask you to examine this document which I

would now like to have identified as Commission's Exhibit 2235.

(The document referred to was marked Commission's Exhibit 2235 for identification.)

By Mr. Coughlin:

Q And ask you to authenticate that as having come from you (handing document to the witness).

【535】 A Yes, sir.

* * * *

【537】 CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Drake, on this sheet that has been marked Commission Exhibit 2235 you list the amounts of your purchases of Borden label evaporated milk for the year 1957 and for a part of the year 1958.

Do you know how much Borden label evaporated milk you purchased in the year 1956?

A No, sir, I don't.

Q Do you have the records on that at your office?

【538】 A I have the records; yes, sir.

Q Do you have the records there for 1955 and 1954?

A Yes, sir. It would take quite a bit of digging to get them but we have them.

MR. LUKINGBEAL:

Off the record, please.

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

By Mr. Lipscomb:

Q Well, Mr. Drake, I have here some records of the Borden Company as to the amounts of your purchases in these earlier years and those records showed that on a tall case basis, that is converting the small can cases into a tall can equivalent your purchases in the year 1956 were 1,615 cases. Does that sound about right to you?

A That would be hard to tell. I am really — in '57, I guess it is if you have the records.

Q That would indicate that your purchases went up quite substantially in the year 1957 because your report here shows that in 1957 your purchases were 2,684 cases. Is that in accordance with your general recollection, that is that you did have a substantial increase in 1957?

A Yes. Now, those are approximate figures. I had the lady in the office to get those for me.

Q I understand.

[539] Going back a little earlier the records of the Borden Company that I have here show that your purchases on a tall case basis were 1,302 cases in 1955 and in 1954 they were 495 cases?

A Yes, sir, we started in 1954, June 1, I believe your records will show that we started our business then, so we didn't have a whole year.

Q I see.

Your purchases, however, in 1955 were even less than they were in 1956?

A Yes, sir.

Q Is that in accordance with your general recollection?

A As far as I know.

Q Mr. Drake, has your company ever asked the Borden Company to pack a private label evaporated milk for it?

A No, sir, not to my knowledge.

Q Have any of your company's customers ever asked your company to obtain a private label evaporated milk for your customers?

A No, sir, not that I know of.

Q Has your company ever asked any other producer of evaporated milk to pack a private label for your company?

A No, sir.

MR. LUKINGBEAL:

That is all, sir.

* * * *

【540】 Thereupon,

CLYDE A. WRENN

was called as a witness for the Commission and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Wrenn, would you give your full name and home address for the record, please?

A Clyde A. Wrenn, 906 East Washington Street.

Q Is that in Greenville?

A Yes, sir.

Q With what concern are you associated, Mr. Wrenn?

A Wrenn & Syracuse.

Q Where is that located?

A On new Easley Highway, Greenville.

Q And what is your position in this concern?

A Partner.

Q What type of business are you engaged in?

A Grocery business, the railroad salvage and grocery [541] business.

Q Retail and wholesale?

A Yes, sir.

Q With what other retail grocery stores are you in competition in the area in which you do business in Greenville?

A Well, all of the majors —

MR. LUKINGBEAL:

Just a minute, sir. I think that that question, your Honor, asked without any further background than we have here calls for a conclusion, that we need more facts in the record as to the location of the stores.

MR. COUGLIN:

I will rephrase the question.

By Mr. Coughlin:

Q What other retail grocery stores are located within the immediate vicinity of your store operation in Greenville, Mr. Wrenn?

A Winn-Dixie, Colonial, Lanford, Kash and Karry, A&P Tea Company, A&A Food Stores.

Q That will be enough. Thank you.

Mr. Wrenn, do you purchase Borden brand evaporated milk under their Silver Cow label directly from the Borden Company?

A Yes, sir.

Q In February 1958 what price were you paying for a case of tall Borden brand evaporated milk?

A \$6.60.

[542] Q How long have you purchased evaporated milk from the Borden Company on a direct basis?

A I don't actually know how long. It has been some time.

Q Can you give an approximate date as to when you began your purchase directly from the Borden Company of evaporated milk?

A I would say two or three years.

Q During the year 1958, Mr. Wrenn, approximately how many cases of evaporated milk have you purchased per week from the Borden Company?

MR. LUKINGBEAL:

I object to asking beyond March 31, 1958, sir.

MR. COUGHLIN:

I will rephrase that and confine myself entirely, Mr. Wrenn, to the period January through March 1958.

A I would say it would average approximately 100 cases a week.

By Mr. Coughlin:

Q Mr. Wrenn, at what price in February 1958 were you selling or merchandising Borden brand evaporated milk in the tall can size?

A Two for twenty-nine.

Q Then, that would mean you were selling a case of Borden brand evaporated milk at \$6.96, is that correct?

[543] A Yes, sir.

Q Or 36 cents mark-up on a case?

A Yes.

Q Mr. Wrenn, of this 36 cents how much was consumed by handling or overhead costs?

A My operating expenses are right at 10 percent. Is that what you mean?

Q That would be 10 percent on the dollar generally, is that right?

A That is 10 percent of my sales a year is my —

Q We are confining ourselves entirely at this moment to evaporated milk with a 36 cents mark-up per case as sold by you to your retail customers.

Now, of that 36 cents is any amount thereof net profit to you after deducting operating and handling costs?

A No, sir.

Q Is evaporated milk regarded by you as a profit item, Mr. Wrenn?

A No, sir.

Q Then why do you handle the product?

A We have a demand for it.

Q What do you mean?

A We have a consumer demand, the customers.

Q So you are required to handle the product?

A Oh, yes, surely.

[544] Q In your parlance, in the retail grocery vocabulary, what do you call an item like that? Do you understand what I mean? What definition do you give to a non-profit item such as evaporated milk?

A We call them football items. That is the word we use there at the store, items that we know we can't make any profit on them.

Q There are other items besides evaporated milk in that category?

A Yes, there are plenty more than evaporated milk.

Q Between the period January 1956 and March 1958, Mr. Wrenn, did the Borden Company ever offer you a private label evaporated milk?

A Not that I know of.

Q You would know if it had?

A I believe I would. I am not sure.

Q Well, then confining ourselves to February 1958, if the Borden Company had offered you a private label milk at a price range of \$5.13 to \$5.25 would you have been receptive to obtaining milk at that figure?

A Yes, sir, I would have liked to have had it.

Q Why is that?

A To meet competition.

Q How do you mean?

A Well, we have some stores that run it 10 cents a can.

[545] Q What stores within your business area, immediate business area, are running or were running in February 1958, a private label at 10 cents a can?

A I don't know whether they were running it back then or not. Here recently they have b e e n running milk for 10 cents and Kash and Karry was running another brand milk at that time.

Q Winn-Dixie and Colonial running brands at that price?

A Occasionally I think they were; I wouldn't be too sure that far back, but for some time they have been.

Q Well, at that time, Mr. Wrenn, were any of the stores just mentioned, specifically Winn-Dixie and Colonial Stores, running a brand milk at a price which you felt was not economically feasible to meet?

A I felt that I couldn't meet it without losing too much money. I mean, the loss there was too great for me to try to lose as big a volume item as canned milk is and I had to just let them undersell me and not try to meet them.

Q Is that one of the factors that would motivate you towards being receptive to buying private label milk, say in February of '58, at the price I quoted to you?

A Yes, sir, I would have liked to have had a cheaper milk to try to meet the competition with.

Q Do you find in the retail merchandising of evaporated milk, Mr. Wrenn, that there is competition in the sale of [546] various brands of evaporated milk regardless of label on the can? Do you s e e what I mean? In other words, they are placed in your store, do you find that there is competition between the various companies to sell this product to the consumer buying in your store?

MR. LUKINGBEAL:

I want to object, your Honor, on the ground that the

record does not as yet show what brands this witness carries in his store.

MR. COUGHLIN:

Why don't we determine what name brands handled by you?

THE WITNESS:

Pet and Carnation and Borden.

By Mr. Coughlin:

Q Do you handle any private label milk at all?

A No, sir.

Q In other words, you do not purchase any private label — do you purchase any private label milk from a milk company?

A No, sir.

Q Well, confining yourself then to the brands of evaporated milk which you merchandise, do you find that there is competition in the sale of those various brands on your shelves?

A No, sir, not no more than the customer demand for it. In other words, we have the three there right together and the customers get whatever brand they wish.

Q So, in other words, it is like any other product like string beans or beans made by various companies, it would be [547] the same type competition?

A That is right, you will find some customers that want one brand of merchandise and some another that is the same situation with the milk.

Q Do you find that your customers are price conscious, Mr. Wrenn?

MR. LUKINGBEAL:

I object to that question, your Honor, on the ground there has been no record established with this witness on which to base it.

MR. COUGHLIN:

He is a retail grocer.

MR. LUKINGBEAL:

Well then I object on the ground the question is too general. If he is talking about whether they are price conscious as to various different items that presumably the witness sells in his store, that is one thing. If he is asking him about evaporated milk it is quite another thing.

MR. COUGHLIN:

I think a customer who is coming into a store, if I may say, your Honor, is there not to buy one specific —

HEARING EXAMINER LIPSCOMB:

I think the witness can explain his answer.

By Mr. Coughlin:

Q Do you remember the question, Mr. Wrenn?

A Yes, about the customers being price conscious.

Q Yes.

[548] A Well, I feel like that that is the way we have built our business like we have is on price.

Q Now, in talking about building your business as a retail store, Mr. Wrenn, do you have a rapid turnover in your merchandise?

A Yes, sir.

MR. LUKINGBEAL:

I object, your Honor. The word "rapid" is totally undefined.

MR. COUGHLIN:

Well, your Honor, if I may say this, at this moment I am attempting to develop with this witness or I attempt to develop his general merchandising policy as a retail grocer. I think it is important to the record to understand merchandising policies for evaporated milk or just general conduct of a retail store operation today, and that is what I am attempting to find out from Mr. Wrenn.

HEARING EXAMINER LIPSCOMB:

Get him to define in some understandable way what rapid is in the way of turnover.

By Mr. Coughlin:

Q Mr. Wrenn, do you operate your business on a basis of retaining items on your shelves for a long period of time?

A No, sir.

MR. LUKINGBEAL:

Well, I object to that, too, your Honor; a long period, it is the same problem.

[549] HEARING EXAMINER LIPSCOMB:

Well, go ahead. I think we will be able to work it out as we go along.

THE WITNESS:

Do you want me to continue?

By Mr. Coughlin:

Q Yes, please.

A We definitely operate on fast turnover.

Q What do you mean by fast turnover, Mr. Wrenn?

A Well, I mean in large quantities with a small profit.

Q You mean and merchandise those —

A Large volume and small profit is definitely how we try to operate.

Q Do you have a general formula that you use for mark-up on your products?

A Well, we have a lot of items in the store that we can get 20 percent cost mark-up which is $16\frac{2}{3}$ of the selling price profit and then we have, as I said in the past there, a lot of items we call football items that we have to meet competition on and lose money, so we break even, some at cost, some below cost.

Q To clarify the record if I may, you say you operate on a fast turnover and that you have a general formula of $16\frac{2}{3}$ percent mark-up on most products. That is a general formula regardless of a specific product?

A We put that on items that we think are not too noticeable to a customer like a can of tomato paste that maybe they buy [550] one or two a week, next week wouldn't buy any, why we try to get that $16\frac{2}{3}$ percent mark-up, and on anything else through the store that way other than the items that, oh, 10 or 12 or 15 items that we have to sell below cost.

Q Those that you sell at cost or below cost are football items?

A Yes, and by losing that, with the 16 percent on everything we can get we average about 12 percent gross. That is what we usually average for the year.

Q Well, you developed this formula through your retail merchandising operations over the period through your experience, is that how you developed this formula for pricing your products?

A Yes. Well, that's more or less a standard of what a lot of big grocery concerns use.

Q Why have you established that standard, if I may ask?

A Well, I have had to figure my expense and go by past records on my volume, gross profit and net profit to —

Q Well, I mean this specifically, Mr. Wrenn, has this figure plus the policy of fast turnover been dominated by the business within the area in which your store is located? In other words, has this been a policy which you have determined of your own or has it been necessitated because of the economic conditions in your area?

A I would say to that if I could make — I have figured \$551.7 if profit was on every item in the store could get by with less than 16-2/3 percent profit, but I have had to add that much to it to offset the loss items in the store to arrive at a 12 percent gross profit which I have to have to net me 2 percent. That is roughly what I net through the year.

Q Do you find that your prices are comparable to the prices charged by the other retail stores in your immediate area?

A I think I am in line with most of them except for a few items.

Q Would you say then that perhaps y o u r prices have been established as a result of the prices charged by other stores in your area, too?

MR. LUKINGBEAL:

Well, now, your Honor, it seems to me he has answered that question. That was gone into at s o m e length as to how he determined what mark-ups would be necessary for him to have on the different items.

MR. COUGHLIN:

I just wanted to establish positively in the record the factors motivating him to set the prices that he does in his store.

MR. LUKINGBEAL:

Well, I certainly agree with you, Mr. Coughlin, the witness never used quite the word you hoped he would use, but I think he has answered the question.

MR. COUGHLIN:

You are reading into my state of mind.

[552] HEARING EXAMINER LIPSCOMB:

I think he has answered the question.

MR. COUGHLIN:

All right, your Honor.

No further questions, your Honor.

MR. LUKINGBEAL:

May we have a short recess?

HEARING EXAMINER LIPSCOMB:

Short recess.

(A short recess was taken.)

HEARING EXAMINER LIPSCOMB:

The hearing will be in order.

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Wrenn, you said that the t h r e e brands of evaporated milk which you have in your store are the three advertised brands, the Pet, Carnation and Borden?

A Yes, sir.

Q Have you at any time in the past carried any other brand of evaporated milk in your store?

A Yes, sir, through railroad salvage I h a v e received other brands of milk.

Q Can you remember which ones those were?

A Well, I received White House, Thrifty Maid there is another brand I get out of Savannah — I don't remember that.

Q How about Armour, have you ever carried that?

A Yes, sir, I received Armour. And Red and White Is there Golden Key milk?

[553] Q I don't know, sir.

A It seems like there is a Golden Key, a brand I received.

Q That is another one you think you have handled at some time or another?

A Yes, sir, through railroad salvage. All these that I have mentioned just now are brands that I have picked up from the railroads.

Q Have you ever asked the Borden Company to pack private label for you?

A No, sir.

Q Have you ever asked any other producer of evaporated milk to pack a private label for you?

A No, sir.

Q There are other producers of evaporated milk who pack private labels in this area, are there not?

A That I don't know. I don't know who packs any of them unless it is Armour. I know Armour packs some milk, but who packs the others I don't know.

Q You mentioned a number of other brands of evaporated milk that you said that you have obtained in the past and sold in your store. I understood you to say you obtained those under some specific circumstances in those cases, but have you ever inquired as to who packs those other brands and whether they would be available to you on a regular basis?

A No, sir, I have asked Armour occasionally their price on milk and it wasn't too much under the other brands, the [554] three I mentioned a while ago, and I would still be losing a good bit of money to be in competition on it, so I just never did buy it. Armour has tried to sell me on several occasions.

Q Mr. Wrenn, you mentioned that you have some 10 or 12 items in your store that you call football items, that is if I understood you correctly the items that you feel you need to carry in order to stay in business but you don't make much profit on the particular item?

A Yes, sir.

Q You included evaporated milk in that category, I believe?

A Yes, sir.

Q What are some of the others?

A Mayonnaise, Wesson Oil.

Q What is that, sir?

A Wesson Oil, coffee, fresh milk, bread, sugar —

Q Well, that is all you recollect at the moment, is it, sir?

A Yes, it is.

Q Well now, as to at least some of those items you mentioned I believe t h a t there are so-called advertised brands, take coffee, for example, you sell the advertised brands of coffee?

A Yes, sir.

[555] Q Do you carry any private label coffee?

A No, sir.

Q Do you carry any private label of any particular product that you can think of?

A The only thing I have a private label out there is a lot of times I get salvaged coffee and they won't let me sell it in their bag and I have one printed, distributed by Wrenn and Syracuse, the bag is printed and that is the only thing I would have there. And then I have a salt that I buy with the private label on it.

Q As to the salt that one is packed for you by somebody with your label on it, is that correct?

A That is right.

Q But except for the salt, if I understand you correctly, you don't have any item in your store which is packed for you by the producer with your label on it?

A No, sir.

Q Well, Mr. Wrenn, you were asked a hypothetical

question as to whether if you had been offered a private label evaporated milk for a price of \$5.13 to \$5.25 you would have been interested; you said you would.

You would not have expected to sell such a product out of your store for a price as high as your price on the advertised brands, would you?

A No, sir.

[556] Q You would have sold it for something a good deal lower, is that right?

A Yes, sir.

Q It's generally true, is it not, that these three advertised brands of evaporated milk sell at higher prices out of the stores than the private label evaporated milks?

A You mean the three advertised brands sell higher than the private label?

Q Yes, sir.

A Yes, sir.

Except I have seen not too many times, once or twice, the nationally advertised milk run at ten cents.

Q That is once or twice in your experience?

A Yes, I have noticed it once or twice with a limit on it.

Q Limit as to how many each purchaser can buy?

A How many cans they can buy; yes, sir.

Q Mr. Wrenn, you mentioned that you pay \$6.60 for your Borden brand evaporated milk. Of course, you do get the 2 percent cash discount, do you?

A Right.

MR. LUKINGBEAL:

Off the record.

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

Off the record.

【557】 By Mr. Lukingbeal:

Q Mr. Wrenn, I would like the record to show at least generally what the trend in the volume of your purchases of Borden brand evaporated milk have been. I have here the records of the Borden Company which show how much they sold to you from time to time. I would like to read you those figures and see whether they are in accordance with your general recollection of them. I recognize you won't be able to remember exactly what they are.

What those figures show is that in the year 1955 you purchased 1,360 cases — and that is on a tall case basis with the small cans converted to a tall case equivalent — that in 1956 your purchases were 3,233 cases; in 1957, 3,675 cases.

A In '57?

Q Yes, sir.

A Right.

Q That shows, then, a constantly increasing volume of purchases. My question is whether that is in accordance with your recollection?

A Yes, sir, it is increasing. Now, '58 is what I stated that it would average approximately 100 a week which would run it 5,000 for '58. Now I am not certain it would run that, but I have got a million dollar increase this year in sales and I know the milk is considerably

higher than it was last year and I was basing that hundred cases on the invoices [558] when I picked them up to pay them they will run from \$500 to \$900.

Now, some weeks it wouldn't be a hundred. With a \$900 invoice there, some milk, some instant coffee on it, I am sure, but I was basing it on the \$900 invoice, probably \$600 worth of milk in it.

Q Yes, sir.

MR. LUKINGBEAL:

That is all, sir.

* * * *

By Mr. Coughlin:

Q In direct examination, if you remember, Mr. Wrenn, I believe you testified that milk and other products are football items, non-profit items?

A Yes, sir.

Q Now, Mr. Lukingbeal just asked whether you received a 2 percent discount on your purchases of evaporated milk from the Borden Company?

A Yes, sir.

Q Now, when you regarded evaporated milk as a non-profit item were you also taking into account the 2 percent discount?

A Yes, sir, it would still be a non-profit item as far as net profit was concerned but it would be a profit item gross-wise but it would still be a loss to net.

* * * *

[559] Thereupon,

HAROLD A. McFEELY

was called as a witness and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. McFeely, would you give your full name and address, personal address, for the record?

A Harold A. McFeeley — M-c-F-e-e-l-y, 1206 West Poinsett Street, Greer, South Carolina.

Q Mr. McFeely, in what business are you engaged?

A Wholesale grocery.

Q Under what name do you operate?

A R. P. Turner & Company.

Q Where is that located?

A At 109 Depot Street, Greer, South Carolina.

【560】 Q Generally what type of business are you engaged in?

A General groceries; full line of groceries.

Q And in what area do you operate? Do you operate in the City of Greenville?

A Yes, sir; forty mile radius of Greer.

Q Would that encompass also the City of Spartanburg?

A It would, yes.

Q In the City of Greenville, Mr. McFeely, what other wholesale grocery companies are located which are competing with you in the business?

A We have the Associated Grocers of Greenville, Moore Milling Company, Smith-Drake Company, I believe located in Greenville that is the only three.

Q In the City of Spartanburg, what wholesale grocery houses?

A Irwin Wholesale Company, Thomas & Howard Company, Orr Wholesale Company. I believe that is it.

Q Did you mention Thomas & Howard from Greenville?

A They don't have a branch in Greenville but they work it out of Spartanburg.

Q They do serve Greenville?

A Yes, as much as I do.

Q Mr. McFeely, do you purchase evaporated milk from the Borden Company under its brand label, Silver Cow?

A Yes, I do.

[561] Q In February of 1958 what price were you paying per case of Borden brand evaporated milk in the tall can size?

A I believe \$6.60 per case delivered.

Q Did you receive a 2 percent discount —

A Cash discount; yes, sir.

Q At what price did you or did you sell this evaporated milk to your customers?

A Ninety percent of it at \$6.60 cost.

Q Do you realize any profit in the sale of evaporated milk to your customers?

A No, sir, it is a loss.

Q Why do you handle this product, Mr. McFeely?

A It is necessary to complete the line. When selling a grocery store you have to have name brands to be able to carry on perhaps 95 percent of a retail grocer's business, to be able to hold it.

Q When you say name brands do you mean the identification of the product or do you mean the prod-

uct itself? Like is it necessary for you to handle evaporated milk regardless of the brand under which it is sold. Is there a demand by your customers for evaporated milk?

A Yes, there is.

Q How long have you purchased evaporated milk from the Borden Company, Mr. McFeely?

A Personally or —

[562] Q Well, your concern?

A The concern, we have been there since 1920 and in the general wholesale business and I am sure that if they were in business we purchased it from the very start.

Q What is your position in the R. P. Turner Company?

A President and principal owner.

Q How long have you occupied this position?

A Seven years.

Q Has the Borden Company between the period January 1956 through March 1958 offered a private label evaporated milk to you?

A No, sir, we have inquired but we were not even able to put our finger on who was packing it until just recently.

Q Well —

A We were not offered by the Borden Company; no sir.

Q Well, did you ask for a private label milk from the Borden Company? Did you contact officials of the Borden Company?

A Yes, I have, in that period I have.

Q At approximately what time in that period or when during that period did you contact Borden officials?

A Well, I talked to their broker within the year and I was advised that he knew nothing of it at all, he had nothing to do with it. He couldn't tell me anything about it at all.

Q Well, Mr. McFeely, in February as in March you were [563] paying \$6.60 a case for Borden brand evaporated milk. Using the month of March 1958 as a basis would you have been interested in buying out of Spartanburg, with a shipment from Chester, South Carolina, private label evaporated milk packed by the Borden Company at a price of \$5 to \$5.25 per case for tall?

A We would have perhaps purchased more than we are of all combined brands right now due to the fact that we have checked the trade and we find that the labels, if they are packed in Chester, they are gaining to where we have a decline in all advertised brands for information where a housewife can buy three cans of milk for 29 cents against two cans for 29 and she finds the milk is just as good and I have used it in my home, I know it is the same milk; I would say that it has hurt our business, in fact my figures here show that I have had a decline —

Q Then you would have been interested in obtaining a private label milk from the Borden Company at the time?

A Definitely.

Q Well, is the explanation you have just made, does it apply to the reason or the reason why you would have been interested in the private label evaporated

milk? Just exactly why would the private label have been important to you?

A I sell government agencies, state and local county [564] quite a bit of merchandise for their chain gang camps and prisons and I have never been able to get that business due to the fact that I had only advertised brands to quote on and in checking at the offices I find that this milk under this label in one particular case has been getting the business for a year or so.

Q Do you remember the name on the label?

A I couldn't touch it. Yes, Red and White, put out by Thomas & Howard is a brand I see in Greenville now in the County Home and various different institutions and it is sold to them on the basis of what you said a few minutes ago, \$5.25 or \$5.30, this milk is sold at 25 to 30 cents a case profit and when I quoted \$6.60 I did not receive any business and I was out of line over a dollar per case. So if I had secured the business at \$6.60 it wouldn't have meant anything, but if I had had the private label milk I could have competed in the market and would have been able to get the business with that price.

Q I see.

Would you also have wanted to obtain private label evaporated milk as an accommodation or as a convenience for your retail grocery store customers in Spartanburg or Greenville?

A I have had hundreds of requests for a labeled milk that they can compete with the chains. That's an almost daily [565] situation, the retailers wonder why I can't get the milk. I am currently buying a private label milk, it is marked skim milk, to compete with

this other, but people see the word "skim" and they back off from it.

Q It is identified on the label as skim?

A It is skim; yes, sir. That is the only milk that I have been able to buy within a price range to try to meet this other competition.

Q Have you ever handled a private label milk, Mr. McFeely?

A No, sir, not in Greer. I have at another concern I was with.

Q But that is prior to five years ago?

A Yes, it is.

* * * *

[567] Q I notice also that appearing on this document, 2237-A for identification, for the year 1956 you purchased 5,184 [568] cans of Borden label evaporated milk in the tall variety; for 1957 you purchased 5,365 cans, and for the year 1958 you purchased through November, 4,695, which appears upon examination to be a reduction in your purchases?

A That is right; yes, sir.

Q Do you have a reason for that?

A Yes, sir, I think that for the last five months we have been troubled more with this private label milk and people are wise to the brands that are being offered and I think it is definitely hurting advertised brands of milk as a whole.

Q In other words, because of the increase in popularity of private label milk, you mean that your purchases have declined, Borden brand evaporated milk?

A Definitely. I am down with Pet, I am down with Carnation; I checked it, this year over last year, and the big talk this past year, and especially the last six months, is this private label milk situation.

Q Did you state on the record, Mr. McFeely, I believe that you have had constant requests by your customers for private label evaporated milk?

A Yes, sir, I have.

Q Well, on that basis, Mr. McFeely, as regards your sale of various brands of evaporated milk to your customers, you say that there is competition between those brands in their sale?

[569] MR. LUKINGBEAL:

Just a minute, sir.

I have interrupted only because I am not sure I understand what "these brands" means in the question.

MR. COUGHLIN:

Excuse me, I will clarify it.

By Mr. Coughlin:

Q For instance, if my recollection is correct you stated that there has been a corresponding decrease in the purchase by you of brand evaporated milk mentioning Pet and Carnation as well as Borden?

A Right.

Q With the increased demand by your customers for private label milk, is that correct?

A The requests for it; yes, sir.

Q Now, using the three brand names of evaporated milk which are the only ones I understand you sell?

A That is right.

Q Borden, Pet and Carnation, and considering the facts as presented, do you regard these brands as well as private label evaporated milk as being in competition with one another?

A Yes, I do. I believe that if this private label milk was not available with the increase in population in here I should be way ahead on all brands, advertised brands, instead of having a decline.

Q Thank you, Mr. McFeely.

[570] Do you find that your retail grocery customers are price conscious in their purchase of evaporated milk?

A More so than ever due to the fact that the chains who have this private label are advertising it in practically every issue and they are running it at ridiculous prices. We feel that the last six months that they have hurt us more. At first we didn't think very much of it. It took awhile for people to find out that they could buy the same quality milk and save a can on the price.

* * * *

[571] CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. McFeely, referring to Commission's Exhibit 2237-A which summarizes your purchases of the Borden label evaporated milk, in the last line here under the year 1958 it shows certain amounts and you have testified to the effect that the amounts there shown are the amounts through November 1958?

A Would you mind letting me look at it? I had somebody in the office to work that up.

Q Certainly.

(Documents were handed to the witness.)

A I wanted to be sure if they added this on there that is what I told them to do.

That is right, that is up to the first of December, the last of November; you are right, sir.

[572] Q And then you also mentioned that you didn't believe you planned to purchase any more during the remainder of this year?

A My reason for it is floor tax in South Carolina no reason with the Borden Company, no.

Q I see.

A No, nothing.

Q All I was thinking was have you had any purchases in this little interim between the end of November and yesterday's date?

A Monday was the last and we bought what we thought would carry us until inventory which is within well, it is the 27th of December is my inventory.

Q Do you remember about how much you purchased so far in December?

A I would say that we were purchasing at least 12 a week.

Q I see.

A Tall and small.

Q Mr. McFeely, there was some discussion during your direct testimony about the kinds of demands that you have from your customers, what kinds of products they want from you. You, of course, no matter how much private label evaporated milk you might be carrying, you would expect to need to continue to carry and have available these three advertised brands?

[573] A Definitely; yes, sir.

Q You mentioned that some five years ago when you were associated with another company, I take it in the grocery business, that you had handled a private label evaporated milk?

A Yes, sir.

Q Do you happen to recollect which one that was?

A Yes, sir, Kenny's; we bought it from United Milk Company which is a private label packer in Wisconsin and we bought it at a great saving under advertised milk. That was our reason for purchasing it.

Q Yes, sir.

I suppose you sold that and by "you" I mean the company you were then associated with, sold that milk to its customers at a lower price than they were then selling the advertised brands?

A Yes, sir.

Q Mr. McFeely, you handle a great number of grocery items besides milk, I take it?

A Around 6,000 different items.

Q And those include items where, generally speaking as to a particular item, there are both advertised brands and private label items available in the market?

A In our particular case 99 per cent are not private label, they have advertised brands.

[574] Q That is when you say in your particular case you mean that your business —

A At Greer, Turner's.

Q At Greer and your company is almost exclusively in advertised brands?

A Advertised brands; yes, sir.

Q And that is true of the items generally that you handle?

A That is right.

Q You said that you charge a price of \$6.60 on the Borden label evaporated milk to your customers in respect of about 90 per cent. What is your price on the rest?

A Ten cents over, \$6.70 is our full list price.

Q And how do you decide whether a particular customer pays one price or the other?

A Well, paying habits, credit and paying habits has quite a bit to do with it. A man that wouldn't pay, discount his bills like he should we get our price of \$6.70 which we think he should pay over the man that discounts his bills every week. And that is the reason we have differential.

Q Mr. McFeely, you mentioned that some time ago, I believe you said about a year ago, you had had some discussion with a broker about private label evaporated milk?

A Within the year, yes, I think that is right.

Q Do you remember who the broker was?

A There is one of them right over there. I mentioned it [575] to him quite a few times, Mr. — the broker over here, Borden broker in Greenville.

Q And what is his name so we get it straight on the record?

A Chamlee.

Q You say you had a number of discussions with Mr. Chamlee?

A Well, I have talked to him several times about it. In fact, his last visit at the office I was discussing it with him, I remember, and I have talked to him at other times.

Q Have you asked him to get Borden to pack a private label for you?

A No, I haven't. And I think in my statement that it was made pretty clear to me that he was not interested in private label milk and what knowledge that he had of these private labels certainly did not go through his office and, therefore, I knew as much about it as he did. I think that is the way we finally wind up our discussion about private label every time we talk about it. He didn't have any price list or he didn't even know what the price was. He hadn't been advised, so I understood, that it was available for him to offer it to me.

Q You didn't ask him for it, is that right?

A I would consider the fact that with the discussions that we had that he knew that I was looking for private label milk. I didn't say, "Bob, go get me 500 cases from Borden [576] or else." He didn't know how to handle it himself, in fact, the way he told me he didn't know for a positive fact that they were actually packing that milk.

Q I see.

A So, he didn't have anything to sell. I wouldn't have no reason to ask him. He didn't have the milk to offer.

Q Did you then make any inquiries of the Borden Company as to the availability of private label evaporated milk or whether they would be in a position to supply you?

A The practice in the jobbing field is not to go direct to manufacturers and go to their representatives in the territory. I have never had any dealings direct

with a company when they have representation in the market.

Q I see. But the answer to my question is that you did not go to the Borden Company?

A No, sir, I did not. In fact, I didn't know where it was coming from. I know now where it is coming from.

Q Did you go to any other producer of private label evaporated milk and ask for a private label to be packed for you?

A No, I haven't.

Q Well, you talked, Mr. McFeely, about the requests that you have had from your customers for a private label. Have you told your customers that you are making efforts to get it for them?

[577] A Frankly, if I can say three words or four up to this point: Private label merchandise is no good for nobody unless there is a price on it.

Q Yes.

A Private label merchandise, 25 years of selling private label my thinking that there is nothing to it unless it is cheaper than the other fellow and you have a price. You cannot sell private label at the advertised brand level. It is no good. Up until six months ago people didn't pay very much attention to it, they would see these brands advertised, evaporated milk at 10 cents, but they are afraid of it because there is other brands of milk on the shelves around at cheap prices that are really not first-grade evaporated milk, the skim milk like I mentioned, but now it is generally known for the last six months that the milk is first-class milk. It is okay for baby feeding and I know for a fact one man in Greer buys 12 cans of that milk

every week and I live next door to him where I could see him over the years with his various — these six children he has — he has bought Carnation milk and then he changed to Silver Cow on account of the coupons. Then his wife started buying private label and she is for the past six or eight months she buys it and feeds an infant with it.

So I would say that it really in the past six months there has been quite a bit of talk. I was interested [578] in it just in the last, say, five or six months. In the retail trade as a whole they haven't been too much interested in it. There have been some great strides in this private label deal and I would love to see how much private label milk some day has been sold around me just for information due to my loss in advertised brands.

I believe that my loss and the other jobbers' losses is made up in private label milk in this market.

Q You say you believe that. I take it you don't have any facts as to the overall sales of —

A Private label?

Q Private label that would enable you to form any sound conclusion on it?

A I haven't got any figures but I know what Community Cash bought through one of their men, they told me how much milk they were buying a month. I couldn't prove it, but to me it was amazing.

Q Well, the extent of your interest in purchasing a private label evaporated milk more than five or six months ago would have been rather minor, I take it from what you say?

A That is correct.

Q You have only very recently begun to have any interest at all in this subject, is that right?

A The only interest that I would have, and I frankly if it was the same price as advertised or 15 cents or 25 cents a [579] case under, it wouldn't sell, they couldn't give it away.

Q It's got to be a big margin in order to make it interesting?

A It has got to have \$1.50 or \$2 a case spread to make it interesting.

Now, the chain stores against independent merchants, I sell chains nothing, independent merchants is all I am interested in.

Q Yes.

A So, when the chains have something that is causing these women to come — that go into these local grocery stores and ask why don't you get this 10 cent milk. They say, I don't know where it is coming from, nobody offers it to me. So they are asking me and I don't know where to get it either. I mean, I know now, but I didn't know then where it was coming from.

Q Well now, haven't you all along known, generally speaking, who the producers of evaporated milk are?

A Oh, yes.

Q You have all along been able to find an address, a mailing address at least for a number of producers of private label milk, haven't you?

A Absolutely, and I made a statement a few minutes ago that when I was vice president of C. E. Kinney and had 64 branches, private label milk, the differential wasn't — sometimes when [580] there was an over-flow of milk and the pastures were green they

probably would give us 75 cents under the advertised but most of the time it was running from 20 to 30 cents and we wasn't interested too much in it, other than further, our Kinney label, private label stuff all over.

When I noticed Thomas & Howard selling Red and White, that is a chain of stores they are starting, I figured the only reason they had that milk was to complete the line of Red and White label which is a national brand private label. I didn't pay too much attention to it until the last three months I have been checking at these places I have been losing milk business to see what brands they are getting, and I know what brand is being sold in these institutions.

MR. LUKINGBEAL:

That is all, sir.

MR. COUGHLIN:

A few questions if I may, your Honor.

REDIRECT EXAMINATION

By Mr. Coughlin:

Q I believe you expressed on cross-examination, Mr. McFeely, that your main concern over private label evaporated milk has developed within the last six months, is that correct?

A Yes, my interest.

Q Did you state also in — I am refreshing my recollection — in direct examination that between January 1956 and March 1958 the Borden Company had not offered a private label [581] evaporated milk to you?

A No, sir, there is nobody connected with Bord has ever mentioned private label availability.

* * * *

Q Well, let me ask you this, if I may, Mr. McFee in conclusion: You mentioned that within the last months, I believe, your retail customers or people who use or purchase evaporated milk whether private or brand label, have become aware of the similarity in grade and quality between private label and brand label evaporated milk; is that correct?

[582] A That is correct, sir.

Q During the period prior to, say, March 1958 prior to six months ago, was this a — the use of private label milk becoming increasingly greater, was there a trend that kept going up to the popularity it enjoys today?

A Yes, sir.

Q In other words, this trend goes back quite a way?

A That is correct, the trend started quite a while ago.

Q You mean back in '57 or so?

A Yes, private label milk has, but today I would say that it is oh, close to the top.

Q In other words, Mr. McFeely, it has enjoyed increasing popularity over the last two years, would you say?

A Oh, I would say quite a large increase.

* * * *

[583] Thereupon,

JOHN C. CROMER

was called as a witness for and on behalf of the Commission and being duly sworn assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Cromer, please state your full name and home address.

A John C. Cromer. You want the business address?

Q No, home address first.

A Roebuck, South Carolina. It's a little settlement about five miles out from Spartanburg.

Q In what business are you engaged, Mr. Cromer?

A Retail grocer.

Q Under what name?

A The Pantry, 479 South Liberty.

Q Are you connected in any way with a grocers' association?

A Well, we have a little, I reckon you would call it a co-op formed by just a few of us merchants for the purpose **[584]** of buying.

Q What is the name of that co-op?

A Allied Food Distributors.

Q And where is it located?

A 221 Cemetery is the warehouse.

Q And from where is the business conducted as far as its office? Do they have an office?

A In the same place.

MR. LUKINGBEAL:

Off the record, sir, if we may.

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

By Mr. Coughlin:

Q Would you again state for the record where the Pantry is located and where the association is located?

A The Pantry is 479 South Liberty.

Q In what city?

A Spartanburg.

Q Where is the association located?

A 221 Cemetery Street, Spartanburg.

Q Thank you.

Do you have an official capacity in the association? Do you have any duties connected with it, in other words?

A Beg your pardon?

Q Do you have any official duties with the association?

[585] A They named me president.

Q How many stores are members of the association?

A We only have seven at the present.

Q Are they all retail grocery stores?

A Yes, sir.

Q Independent stores?

A Yes, sir.

Q Are they all located in Spartanburg?

A Yes, sir.

Q Mr. Cromer, within your knowledge are the member stores of your association in competition with chain stores in the City of Spartanburg?

A They are.

Q Would you name some of the chain stores, please.

A Well, there is A & P, Colonial, Winn-Dixie, Community Cash. I believe that's all the chains in Spartanburg.

Q Well, to explain more fully the purpose of the association, exactly why was it constituted?

A Our little association?

Q Yes.

A For the purpose of buying so that we would be able to compete with larger buyers prices.

Q How do you mean "buying"?

A I mean —

Q Buying directly —

[586] A Co-ops get our buying together and then buy in one — on one invoice rather than have it in seven different invoices, why you can, volume buying is what we call it.

Q In other words, the association purchases from manufacturers for the retail grocer members of the association; is that correct?

A That's right; and jobbers. We buy from jobbers along with that.

Q Do you purchase evaporated milk from the Borden Company under its Silver Cow label?

A Yes, sir.

Q How long have you purchased this milk?

A Now let me make it clear, not directly — the jobber is not a direct account. We buy that through the jobbers.

Q I see.

How long have you been buying Borden Silver Center evaporated milk from the jobber?

A Well, to my best knowledge I reckon since 1958, ever since I opened up. I think I was buying it along with the others, I wouldn't say that for sure.

Q Well, how long has the association been in existence?

A Since '49.

Q What is the price that you pay for Borden brand evaporated milk in March of 1958, Mr. Cromer? The tall size, per case.

[587] A Where we have it delivered to the store it's \$6.70 and if we can pick it up, we save a dime on it which is \$6.60.

Q When you say "pick it up," from where do you pick it up?

A At the jobber's warehouse.

Q And that is \$6.60?

A Yes, sir.

Q What percentage of the milk purchased from the Borden Company do you pick up at \$6.60 rather than receive it at \$6.70?

A From —

MR. LUKINGBEAL:

May I interrupt just a second. I think it is unclear whether some of this questioning is directed to the witness in his capacity as a representative of the association.

sociation or whether it's directed to him in his capacity as the owner of a particular store.

MR. COUGHLIN:

Excuse me. I thought I had made that clear.

I wish to be understood for the record in my examination of this witness it concerns only his purchasing through the association. I'm not concerned with his individual store operation; it is solely to the association.

By Mr. Coughlin:

Q Is that understood, Mr. Cromer?

A Yes.

[588] Q Fine.

Now, does that alter any of the testimony that you have given with regard to the price paid for Borden evaporated milk?

A No, the truck picks up for the whole group when it gets anything; when it gets something for every store.

Q And when it picks up from the jobber's warehouse for the members of the association the price for Borden evaporated milk is paid of \$6.60; is that correct?

A That's right.

Q Now, in March of 1958, to the best of your recollection, what percentage of the milk purchased by the Association for the retail members was purchased at \$6.60 per case of tall evaporated milk?

A Well, to my knowledge all that we used except maybe a fill-in — see, this pick-up is only every other week and if a store would run out, probably he would pick it up from the jobber's salesman.

Q So, a minimal part of your purchases of Borden evaporated milk consisted of the \$6.70 price for the tall; is that correct? A very small part?

A Yes, small part of it.

Q All right. Is that so over the period of the last year from, let's say January through March of '58? Would you say that that has been a consistent policy or was that only for [589] March of '58 that that was so?

A I don't know just how far back we got — our truck was picking up that milk — but I believe you can say that for several years.

Q Well, when you purchase this milk at \$6.60 through the jobber, at what price is it sold to the members of the association?

A Exactly what it costs us.

Q Do you regard evaporated milk as a profit item, Mr. Cromer?

A No, sir.

Q Then why do you handle it?

A Well, it's essential in the grocery business and is one of the items that we feel like that we handle more or less just to have something the housewife needs. Several other items in that same category, you know.

Q Mr. Cromer, during the period January 1956 through March of 1958 did the Borden Company offer a private label evaporated milk to you?

A No, sir.

Q If the Borden Company had offered a private label evaporated milk, tall size case, at approximately \$5.00 to \$5.25 would you have been receptive to that offer? Would you have been interested in obtaining the milk at that price?

A Unless they would have required so much that you could get that.

[590] Q I'm not talking about any minimum requirements connected with the sale of the milk; this is unattached, it's a pure offer.

A Yes, sir.

Q Why would you have been interested in the milk at that price, Mr. Cromer?

A Well, anything that you get for — buy cheaper you'll be able to offer it to your customers cheaper, so it would have an incentive to pull trade in if you could sell it cheaper.

Q You think there would be a definite advantage connected in the retail merchandising of canned evaporated milk under the private label at a price less than that charged for the brand label? In other words, there would be consumer acceptance for that product?

A Yes, sir.

Q Do you think it would be advantageous to your retail store operation to obtain the milk at that price? Say, \$5.00 to \$5.20?

MR. LUKINGBEAL:

Just a minute.

He now speaks of "your retail store operation." I take it that means Mr. Cromer's particular store.

MR. COUGHLIN:

I should have made that plural, actually grammatically, I could rephrase it.

[591] By Mr. Coughlin:

Q Do you think it would be advantageous for the retail store members of your association to be able to merchandise a private label milk at a price less than that which it charges for its brand label evaporated milk?

A I think it would be to their advantage.

Q Is that the reason why you would want to obtain a private label milk at a price as I quoted of \$5.00 to \$5.25?

A Yes, that would be the reason.

Q Mr. Cromer, you operate a retail store, is that correct?

A I do.

Q And all the members of your association are independent retail grocery store operators?

A Yes, sir.

Q Then you know something about merchandising practices, I imagine. In other words, selling products to customers?

A Well, I try to learn a little bit about it.

Q Have you found that your customers are price conscious?

A Yes, they are very price conscious, especially recently. It seems like their change is a little harder to get ahold of.

Q Excuse me. What was it?

A The money, I say, is a little harder to get ahold of than it was at one time and they are more price conscious than they were some time ago.

[592] Q Between January 1956 and March of 1958, Mr. Cromer, did you handle a private label evaporated milk at all, regardless of by whom packed?

A What dates now?

Q Between January 1956 and March of 1958?

A I don't know how long it's been since —

Q When I say "you," I mean did the association handle.

A I'd still rather say I don't know whether they had a private label.

Q If they did have do you feel you would have known about it?

A Well, now, we have got two stores in the group that are a little larger than the rest of us and sometimes they get ahold of something like that to run a special on and don't say anything to us.

Q Well, within your knowledge you don't know?

A I don't know.

Q One further question if I may, or two.

Mr. Cromer, buying in a direct manner from the Borden Company in that you pay \$6.60 per case, or did pay in March of 1958, at that time did you receive a two per cent discount from the Borden Company?

A We didn't buy it direct, you see, we bought it through the jobber.

Q Mr. Cromer, do you have any information as to the number [593] of cases of Borden brand evaporated milk which the association has purchased or purchased between January of 1956 and March of 1958 per week?

A No, I don't have any direct information as to that.

Q Can you give an approximate figure?

A Talking to two or three of the members, why, we estimated it probably is 600 cases a year would take care of our output of Silver Cow milk.

Q But you are unable to break that down?

A I wouldn't unless it was necessary. I would have to go back to our invoices.

MR. COUGHLIN:

Thank you, Mr. Cromer. I have no further questions, your Honor.

MR. LUKINGBEAL:

May we have a brief recess, your Honor?

HEARING EXAMINER LIPSCOMB:

Brief recess.

(Thereupon, a short recess was taken.)

HEARING EXAMINER LIPSCOMB:

The hearing will be in order.

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Cromer, in your own store, the Pantry, what kinds of evaporated milk do you sell?

A Silver Cow and Pet and Carnation. Recently I've got — I can't recall the name of that skim milk I have got there now. [594] I get it from R. P. Turner, but I have only handled the fourth case of it, and then Miss Virginia, I believe it is.

Q Miss Virginia is a private label evaporated milk?

A I get it through Thomas and Howard.

Q It's not a skim milk though, it's a regular —

A I think it is.

Q Full scale milk?

A It's a little cheaper.

Q What is your price to your customers on the advertised brands, the Borden, the Pet and Carnation?

A My price is two for 31. The majority of our group is three for 45. Now, is that clear or do you want just my store?

Q That's quite all right, sir. That is exactly what I wanted.

And what is your price, sir, on the Miss Virginia, the private label?

A Two for 29.

Q Mr. Cromer, when Mr. Coughlin asked you this hypothetical question as to whether back in March of this year you would have been interested in buying a private label for \$5.00 or \$5.25 you said you would have been. Of course, you would not have had in mind selling that to your customers for the same price that you are selling these advertised brands, would you?

[595] A No, I had in mind selling something cheaper than I could entice the customers to come and get that along with other stuff.

Q The advertised brands generally sell at a higher price, don't they, than the private labels?

A So far to my knowledge it does.

Q Are there any of the other stores in your association who handle any private label evaporated milk such as the Miss Virginia?

A Well, yes, but I can't give you what they get for it. I don't know what they sell it for.

Q But others in your group do handle private label evaporated milk, is that right, sir?

A Yes, Miss Virginia.

Q Yes, sir.

A Now, if that's a private label I didn't know it, is it packed for Thomas and Howard? I didn't know that.

Q Just so we are sure we understand let me just ask whether other stores in your group handle Miss Virginia evaporated milk?

A Yes, they do.

Q Do you buy your Miss Virginia evaporated milk from a jobber?

A Yes, sir.

Q And that is from whom?

[596] A Thomas and Howard.

Q The other stores buy theirs from a jobber?

A Yes, sir.

Q Thomas and Howard?

A Yes, sir.

Q Talking only about your own store, with your price of two for 31 on the advertised brands and two for 29 on the Miss Virginia, how does your volume of sales on advertised brands compare with your volume on Miss Virginia?

A Well, I still sell more of the advertised brands than I do of Miss Virginia.

Q Mr. Cromer, what is the name of the jobber from whom the association gets its Borden brand evaporated milk?

A You mean — most any of them will sell it to you when you pick it up for \$6.60.

Q Is there any one that you customarily buy from?

A Mostly Thomas and Howard.

MR. LUKINGBEAL:

That's all, sir.

MR. COUGHLIN:

Just a few questions, Mr. Cromer.

REDIRECT EXAMINATION

By Mr. Coughlin:

Q First of all, how long have you been handling Miss Virginia evaporated milk in your store, The Pantry, the approximate date, Mr. Cromer?

A Well, I don't know just when I got the first case of it.

【597】 Q Six months? Eight months?

A I'd say six months and feel like I was telling the truth.

Q In that period how much have you paid per case for Miss Virginia, tall?

A I didn't get that figure. I figured it when it first came in.

Q Do you have an approximate figure perhaps?

A I'd rather not answer that question; I wouldn't know just exactly what it did cost me.

Q Well, Mr. Cromer, has the association purchased for its members Miss Virginia evaporated milk?

A It doesn't seem that that has been a volume that would justify them in buying that way. They haven't—

Q You have not purchased it?

A No.

Q Has Miss Virginia evaporated milk been offered to the association at all?

A Only to the individual stores that I know of.

Q Now, using your figure of six months, I believe, as the time during which your store, The Pantry, has

been selling Miss Virginia evaporated milk, have you found that the sales of this private label milk have been increasing or decreasing?

A It's increasing. They are satisfied with it when they use it, it seems to be.

Q But each week you can see an increase or each period an [598] increase in sales?

A Yes.

MR. COUGHLIN:

That's all I have, your Honor.

MR. LUKINGBEAL:

Just a second.

RECROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Cromer, speaking now of the Borden brand evaporated milk, do each of the stores in your group send their orders in to the jobber and then a truck goes around and picks up all of your orders at once? Is that the way it works?

A No. The seven stores maintain a little warehouse. We pay one man and own a truck. This fellow is in the stores two or three times a week for different reasons, and the week before or Monday before he picks it up, Tuesday, he contacts each store and asks them to let him know the amount of the different kinds of milk that they want. He gets the orders from the store himself, our employee.

Q Yes, sir.

Well, so far as your particular store is concerned the Borden brand evaporated milk that you get comes to you on the truck that has the orders for the other stores, too; is that right, sir?

A That's right.

Q Well, what about your Miss Virginia? Do you send a separate truck to get that or does the jobber send it on his [599] own?

A The last two cases I bought it did come along with the same truck.

Q I see.

A That is, he would ask me, he would say, "How about your Miss Virginia?" I said, "Bring me a case of that."

Q What about the other stores in your group that are purchasing the Miss Virginia? Are they getting it through your association man the same way?

A I don't know.

Q I see.

Well, your Borden brand, Mr. Cromer, do you get an invoice or a bill from the jobber addressed to your store —

A Allied Food Distributors.

Q To Allied Food Distributors. And then Allied Food Distributors in turn bills your store; is that correct, sir?

A Yes, sir.

Q Well, Mr. Cromer, before the time that your store and other stores in your group commenced to handle the Miss Virginia did either you as an individual store owner or the association go to any jobber and ask them for a private label evaporated milk?

A Not to my knowledge.

MR. LUKINGBEAL:

That's all, sir.

* * * *

【600】 Thereupon,

A. T. CHARLES

was called as a witness for and on behalf of the Commission and being then and there duly sworn assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Will you please give your name and home address?

A Home address?

Q Name and home address.

A A. T. Charles, 390 East Park Drive, Spartanburg.

Q What is the nature of your business, Mr. Charles?

A Grocery business.

Q And under what name do you operate?

A Charles Market.

Q Where is that located?

A Two stores, one is located at 460 West Henry Street and one is 214 Young Street.

Q Both in Spartanburg?

A Both in the City of Spartanburg.

【601】 Q Is it a regular retail grocery—

A Right, regular retail.

Q (Continuing) — and many type products?

Mr. Charles, do you merchandise the Borden brand evaporated milk sold under the Silver Cow label?

A Yes, sir.

Q How long have you sold this product, approximately?

A How long have I sold it?

Q Yes.

A I think it's been about 18 years that I carried it.

Q Do you buy this product directly from the Borden Company or do you obtain it from a wholesale grocer?

A Wholesale grocer.

Q What price did you pay for Borden brand evaporated milk in March of 1958, Mr. Charles?

A I don't believe it's changed.

Q No, it hasn't.

A Today's price, \$6.70 is what we pay.

Q At what price do you sell this product to your retail customers?

A Regular every day price is two for 31.

Q In other words, there is a 74 cent per case mark-up?

A Right.

Q On your Borden brand evaporated milk?

A Right.

[602] Q Is the sale of evaporated milk a profit item to you, Mr. Charles?

A No, I don't think so.

Q Well, if you have a 74 cent differential —

A At every day prices. Now, I guess maybe six weeks out of a year I'll be running that milk at below cost on weekends.

Q As a loss leader?

A Loss leader.

Q Well, normally though, your mark-up is 74 cent on a case?

A Yes.

Q Is the 74 cent differential in price between the amount which you pay per case and that amount which a case is sold by you sufficient to cover your overhead and handling costs and leave some profit besides?

A No.

Q Well, then you did say that this is not a profit item, is that correct?

A That's right.

Q Then I would ask you, Mr. Charles, why you handle the product.

A Well, it's a necessity for the store to carry milk.

Q You have a constant customer demand for the product?

A Oh, yes; that's right.

Q Mr. Charles, if you were paying \$6.70 for a case of [603] Borden brand evaporated milk, the tall size can, in March of 1958 and you had an opportunity to purchase a Borden private label evaporated milk at a figure of approximately \$5.40 to \$5.50 a case, would you have been interested?

A Yes.

MR. LUKINGBEAL:

I want to object there, to describe the alternative as a Borden private label is somewhat misleading to the witness and doesn't pose the alternative that I am sure Mr. Coughlin intends to pose to him. I think what he means is a can of milk with a private label on

which happens to be put up by the Borden Company, but without Borden's name on it at all.

MR. COUGHLIN:

I mentioned a Borden private label only because I regard Borden as the manufacturer or the packer of the product. When I speak of a private label I mean a label other than that —

MR. LUKINGBEAL:

And without Borden's name on the can.

MR. COUGHLIN:

And without Borden's name on the can.

By Mr. Coughlin:

Q But if you had an opportunity to purchase a private label milk at that price in March of 1958 would you have been receptive?

A Yes, sir.

Q Why is that, Mr. Charles?

[604] A Well, I feel like I would be able to give a better price on canned milk and might make a little more money off of it, too.

Q In other words, you believe that if you were able to obtain private label milk at a price quoted by me you could derive some profit from the sale of that milk and still sell it for less than you sell your brand label?

A I believe so; yes.

Q Would that be the primary reason for your handling private label?

A Yes.

Q Mr. Charles, are there any other independent tail stores or chain stores located around your store?

A Yes.

Q Would you name some of these stores?

A The chain stores?

Q Any of the other stores that surround either your two stores in Spartanburg.

A The Community Cash chain, they are located around me.

Q Do you follow their pricing policies pretty closely, Mr. Charles, as far as they advertise in the newspaper in Spartanburg?

A Follow their advertised prices?

Q Yes.

【605】 A You know, the closest I can.

Q In other words, you observe their pricing policies as they advertise them in the newspaper?

A Yes.

Q Have you noticed or did you notice in March '58 or a period prior thereto the pricing of a tall can of a private label evaporated milk at the Community Cash stores at a price less than that which you have charged for your evaporated milk?

A Yes, sir.

Q Did you find, Mr. Charles, that you were able to sell your evaporated milk at the price quoted by the Community Cash in that period?

A No, sir.

Q Would your desire to obtain a private label evaporated milk be motivated by a wish to sell your milk at a price less than that which you sell your brand label evaporated milk?

A Yes.

Q Then, the profit factor that might be derived from the sale or purchase of private label milk would not be the only factor motivating you to buy private label milk; is that correct?

A I didn't understand.

Q In other words, there would be other factors than possibly profit which would make it attractive to you to buy a private label milk?

[606] A Well, yes, I would be able to meet — try to meet competition.

Q Do you feel that if you had a private label milk you might sell this private label milk at a price similar or comparable to that charged by some other stores in your area?

A Right.

Q Now, as a retail grocer, Mr. Charles, do you find that your customers are price conscious?

A Yes, sir.

Q Increasingly more so today?

A Yes.

Q Mr. Charles, to the best of your recollection for the period from January through March of 1958 how many cases a week of Borden brand evaporated milk did you purchase, if you know that figure?

A About an average per week?

Q Yes.

A About five cases.

Q Is that for both stores in Spartanburg?

A Yes.

Q Both stores?

A Both.

Q Thank you.

Would you say that figure has remained constant for the last couple of years or has it increased or decreased?

[607] A I believe it has decreased.

Q Decreased?

A Yes, sir.

Q In other words, in 1957 you purchased more cases of Borden evaporated milk per week than you did in '58?

A Right.

Q Do you have a reason for that, Mr. Charles?

A Well, the price conscious, they are shopping around for cheaper milk.

Q In other words, you find some of your customers not willing to buy the brand label evaporated milk today at the price which you must charge?

A That's right.

Q How long has this trend been noticeable by you, Mr. Charles?

A For the canned milk?

Q Yes.

A In the last, well, the last two years it has been dropping.

Q Have you been aware of other stores in Spartanburg or stores within the immediate vicinity where you conduct business being able to obtain private label milk?

A Only the chain stores.

Q But you did know that they were able to obtain a private label milk?

A Yes.

[608] Q Do you feel that this private label has been a factor in your reduced sales of brand labels?

A Yes, sir; very much.

Q Is that one of the reasons you might like to obtain a private label?

A Right.

MR. COUGHLIN:

I have no further questions.

MR. LUKINGBEAL:

May we have a short recess?

HEARING EXAMINER LIPSCOMB:

Short recess.

(Thereupon, a short recess was taken.)

HEARING EXAMINER LIPSCOMB:

The hearing will be in order.

Q Mr. Charles, I believe you also handle the Pet and Carnation evaporated milk; is that right, sir?

A Yes.

Q And you get those from jobbers?

A Jobbers.

Q Wholesalers?

A Yes, sir.

Q I suppose you have a number of other staple items in your store, sugar, salt, all that kind of thing?

A Right.

Q Do you buy that from jobbers, too?

[609] A Right.

Q Is there any item that you buy directly from a manufacturer?

A I don't believe there is.

Q Mr. Charles, Mr. Caughlin was speaking with you about the situation back in March of 1958 and you mentioned private label evaporated milk prices being charged by some of your competitors around t h a t time. What were they selling their private label milk for?

A I don't recall right now.

Q Well —

A I believe it was two for 25 cents.

Q Two for what?

A Two for a quarter was right, I'm not sure.

Q I see.

Well, take at any time over the period in the last couple of years, what has been the range of prices for private label evaporated milk that your competitors have been charging?

A Well, the last weekend I noticed they had quite a few of them at 10 cents a can.

Q Ten cents a can would be \$4.80 a case; is that right?

A Right.

Q So, if you wanted to be in a position to meet that competition without making any profit at all you would have to be able to get the private label for \$4.80 a case; is that [610] right, sir?

A Yes, sir.

Q If you paid even as much as \$5.25 a case for it and sold it at 10 cents you would be losing money; is that right?

A Right.

Q Do you have any grocery items right now that you are selling at a loss equivalent to the loss that you

would have if you paid \$5.25 for evaporated milk and sold it for \$4.80?

A You mean just every day prices or weekend prices? The way we make our specials, leaders?

Q Well, let's take every day prices.

A No, we are not losing money.

Q It isn't a thing you customarily do?

A Beg pardon?

Q You don't customarily sell any item at a loss; is that right, sir?

A No.

Q You might do it occasionally on a loss leader situation?

A Right.

Q Mr. Charles, what jobber do you get your Borden brand evaporated milk from?

A Well, I don't have any special one. They are all the same price so I divide it up with about three or four of them.

Q Have you ever asked any of those jobbers to furnish you [611] with a private label evaporated milk?

A No.

Q Is one of the jobbers from whom you buy from time to time Thomas and Howard?

A Yes.

Q Mr. Charles, you mentioned you have two stores. Do you have a rough idea how many square feet of floor space you have in those stores?

A No, I don't. They are pretty small.

Q And in each of those you are stocking the three advertised brands of evaporated milk?

A Three.

Q I suppose in order to take on a private label you would have to either expand your store or put something else out; is that right?

A I don't think so. Put it out on the floor.

Q Beg your pardon, sir?

A Build a display in the floor.

Q I'm sorry, I didn't understand your answer.

A I'm sorry; I can't hardly talk today and I got out of bed to come here. We'd build a display out in the floor.

Q You would put it out on the floor; is that right?

A Put it out on the front, keep adding some way.

Q Taking both of your stores together, Mr. Charles, roughly what is the volume of your grocery sales per week?

[612] A I run around \$5,000 a week.

Q Well, I suppose, Mr. Charles, that among the items you handle in your stores there are a number of them like coffee, for example, where there are both advertised brands and private labels —

A Yes.

Q (Continuing) — generally available?

Do you handle private labels?

A No.

Q You stick to the advertised brands on all of your items; is that right, sir?

A I have never been offered any.

Q Did you ever ask anybody for any?

A I'm asking all the time for something to sell, bargains, anything I can buy to make a leader. I'm asking every day. Every jobber I ask what has he got to offer in prices.

Q In evaporated milk?

A Anything; everything.

Q A while ago you told me that you had not asked for a private label on evaporated milk.

A Well, now, I didn't come out and directly ask for milk. I'm asking them every day for their specials, whatever they have got that I could run, make a leader out of it, whether it's grits, coffee, milk, sugar, whatever it is.

Q But not specifically as to evaporated milk?

[613] A No, no specified item.

MR. LUKINGBEAL:

That's all, sir.

* * * *

Thereupon,

HENRY GRADY COLEMAN

was called as a witness for and on behalf of the Commission and being duly sworn assumed the witness stand and, upon examination, testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Coleman, would you please give your full name and home address for the record?

A Henry Grady Coleman.

Q And the address, Mr. Coleman?

A Ashville Highway, 7708.

Q And what business are you in, Mr. Coleman?

A Groceries.

Q And what is the name of your store?

A Southern Shop Market.

Q And where is that?

[614] A Camp Croft Market.

Q That is two stores?

A Yes, sir.

Q Would you give the address for both of those stores, please.

A Ashville Highway store is 7708 and the Camp Croft is Route 4.

Q Both in Spartanburg?

A Yes.

Q Are you in the general retail grocery business?

A Yes, sir.

Q What other stores like your own are located around your Camp Croft Store or around your Ashville Highway store, Mr. Coleman?

A Well, the Community Cash is back up this side about three-quarters of a mile, I guess.

Q On the same highway?

A Yes, sir.

Q Mr. Coleman, do you purchase Borden evaporated milk under their Silver Cow label?

A Yes, sir.

Q Do you buy this from wholesale grocers in Spartanburg?

A And Greer.

Q In Greer?

A Yes.

[615] Q Who is the wholesale grocer from whom you buy?

A R. P. Turner.

Q Thank you.

How long have you purchased Borden brand evaporated milk?

A Twelve years.

Q If you remember, in March 1958 what was the price you were paying for a case of Borden tall evaporated milk? Now, if I may say, the price today unless there is —

A In '58, I mean '57?

Q In March of '58.

A Oh, I think it was \$6.70. I do my own hauling and I believe it's \$6.70 that we pay for it.

Q At what price do you sell this milk to your customers or did you sell this milk to your customers?

A Well, I sell 15 cents a can straight or four for 59.

Q Well, there would be, I believe, on that basis a 38 cent mark-up per case of evaporated milk of the Borden Company?

A Yes.

Q Mr. Coleman, do you regard evaporated milk as a profit item?

A No, sir; there's no profit there.

Q In other words, you don't realize any profit in the 38 cents difference in price that you make on the sale of a case [616] of the Borden evaporated milk; is that correct?

A Yes, sir.

Q Well, may I ask you why you handle this product?

A Well, you have got to handle it to satisfy the customers.

Q Do you find a constant demand for this product by your customers? Is that right?

A Yes, sir.

Q What other brand name evaporated milk do you sell?

A I sell Carnation and Pet.

Q Do you handle any private label evaporated milk, Mr. Coleman?

A No, sir.

Q Have you ever handled any private label?

A No, sir.

Q Well, going back to March 1958 at which time you were paying \$6.70 a case —

A Yes.

Q (Continuing) — for Borden evaporated milk —

A Yes, sir.

Q (Continuing) — if you had been able to obtain from the Borden Company a private label milk at a price of around \$5.25 to \$5.50 would you have been interested in that product?

A Yes, I would be interested.

Q Would you tell us why?

A Well, I could have realized more profit out of it.

[617] Q Well, would you sell this milk to your customers at the same price you charge for your brand evaporated milk?

A Well, I don't know why I would have sold it as high or not, but I would have put a better mark-up on it than I had on the other.

Q Have you noticed that the Community Cash which I believe you said is located about three-quarters of a mile from your Ashville Highway store has advertised a private label evaporated milk this year or say between January and March of 1958 at a price less than that which you have charged for your evaporated milk?

A Yes, sir.

Q Have you attempted to lower the price of the brand label evaporated milk which you have to meet the price asked by Community Cash store for its evaporated milk under a private label?

A No, I haven't met theirs.

Q Well —

A I haven't lowered the price.

Q Why haven't you lowered it, Mr. Coleman?

A Well, just losing a little too much money to meet their price.

Q Well, if you could buy a private label milk at the price I quoted to you do you think perhaps you might be able to lower the price of that milk or you would be willing to lower [618] the price of that milk to meet that of your competitor?

A Yes, sir.

MR. LUKINGBEAL:

I want to object, there has been no price of the competitor stated here.

MR. COUGHLIN:

The price of the competitor isn't that important, your Honor. What I am trying to establish is that the price of the competitor is low enough that he has not been able to meet that price with his brand label but he thinks he could meet it with his private label which would be less.

Now, the importance of a specific figure is not present here. I could quote a figure, I could determine that, but it is not relevant. Would you wish —

HEARING EXAMINER LIPSCOMB:

I think it is all right.

MR. COUGHLIN:

Thank you.

By Mr. Coughlin:

Q Mr. Coleman, in the retail operation of a grocery store you get to know your customers pretty well I guess, and have you found that your customers are price conscious in what they pay for their goods?

A Yes, I have had kicks on them.

Q You have had complaints by your customers as to the price you have had to charge for your products?

A Yes.

Q Have those complaints ever been made with regard to the [619] price you charge for evaporated milk, Mr. Coleman?

A Yes, sir.

Q Have you had your customers ask for evaporated milk at a price less than that which you charge?

A That's right.

Q Mr. Coleman, within your recollection could you tell us how many cases per week of Borden Brand evaporated milk you purchased between January of this year and March?

A Well, it runs on the average of about eight to ten a week.

Q Is that for both stores?

A Both stores.

Q Thank you.

Has that been fairly constant over the last year or two?

A No, in '57 it was running about 15 cases a week.

Q To what do you attribute this change? Why do you buy fewer cases or have you bought fewer cases of evaporated milk between January and March of '58 than you bought in prior years? Is there a reason for it?

Q Why don't you buy as much evaporated milk this year as you bought last year?

A Well, it just ain't selling as good. I don't sell as much of it as I did.

[620] Q Do you think that is because of your customer complaints over the price of the evaporated milk?

A I think so; yes, sir.

MR. COUGHLIN:

That's all I have, your Honor.

MR. LUKINGBEAL:

May we have a few minutes?

HEARING EXAMINER LIPSCOMB:

Recess.

(Thereupon, a short recess was taken.)

HEARING EXAMINER LIPSCOMB:

The hearing will be in order.

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Coleman, I suppose you have a large number of grocery items in your stores?

A Yes, sir.

Q Do you buy all of those from wholesalers?

A Yes, sir.

Q Do you ever buy any items of any kind from Thomas and Howard?

A Yes, sir; I buy some.

Q Have you ever asked Thomas and Howard to sell you a private label evaporated milk?

A No, sir.

Q Have you ever asked any other wholesaler to sell you a private label?

A No, sir.

【621】 Q Do you carry any private label merchandise of any kind in your stores like a private label coffee or whatever it may be?

A No, sir; I don't think so.

Q You stick to the advertised brands?

A Yes, sir.

Q You mentioned, Mr. Coleman, about this Community Cash store that's three-quarters of a mile from you. At what prices have they been selling private label evaporated milk?

A Well, I noticed in the paper, I believe it was ten cents a can is what they run.

Q That would be \$4.80 a case, right?

A That's right.

Q So that if you got a private label for \$5.50 a case you would lose 70 cents on each case?

A That's right.

Q If you meet that competition; is that right, sir?

A That's right.

Q Do you have any items in your grocery that you sell at a loss of that kind?

A Yes, sir; on my specials on the weekend.

APPENDIX

Q Weekend loss leader once in a while; right?

A That's true. What I made this year on the stores it looks like they've all been lower.

[622] MR. LUKINGBEAL:

That's all, sir.

* * * *

[624] Thereupon,

CLYDE E. TODD

was called as a witness for the government and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Will you please state your full name and home address for the record?

A Clyde E. Todd, 3409 Eastway Drive, Charlotte, North Carolina.

Q And with what organization are you associated, Mr. Todd?

A Associated Grocers Mutual of Carolinas, Inc.

Q Where is that located?

A 4000 Raleigh Street, Charlotte.

Q What is the business of this concern?

A Wholesale grocers. It is a grocery cooperative.

Q How many members do you have in the cooperative?

A About 235.

Q Are they all located within the City of Charlotte?

A No, sir.

Q Well, within what radius of the City of Charlotte are [625] they located?

A Most of them are within a radius of 60 to 80 miles of Charlotte; possibly one exception.

Q What type of concerns are these that are members of the Association?

A Retail grocers.

Q Do you buy for the retail grocer members of your Association? Do you buy the goods that they retail, the merchandise?

A That is right; yes, sir.

Q Mr. Todd, are the members of your Association within the City of Charlotte in competition with any of the large chain grocery stores also in Charlotte?

A Yes, sir.

Q Would you name those stores, please?

A A&P, Winn-Dixie, and Colonial Stores.

Q What position do you occupy with the Association, Mr. Todd?

A General Manager.

Q Do you purchase Borden brand evaporated milk under their Silver Cow label?

A Yes, sir.

Q How long have you purchased this product? Approximately?

A At least eight years.

Q In what way do you obtain this product? Do you buy [626] directly from the Borden Company?

A Yes, sir.

Q Mr. Todd, what price were you paying for Borden brand evaporated milk in March of 1958?

A I believe it is \$6.10.

Q Well, it is a little while ago.

Could I go off the record just a minute?

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

THE WITNESS:

'58, that is this year?

MR. COUGHLIN:

Yes, '58.

THE WITNESS:

\$6.60; I am sorry.

By Mr. Coughlin:

Q In other words, Mr. Todd, in March of 1958 you were paying \$6.60 a case for tall, Silver Cow label evaporated milk, produced by the Borden Company?

A That is right.

Q At what price did you in that month sell this product to your retail customers or members?

A \$6.60.

Q Then, you made no mark-up at all in the cost of the product to you?

A That is correct.

Q Did you receive a 2 per cent discount on your purchases of Borden brand evaporated milk?

【627】 A Yes, sir.

Q Was this 2 per cent discount sufficient to cover your handling and overhead costs?

A I wouldn't think so.

Q Well, can you say whether you did or did not derive any net profit?

A There is no profit derived from the sale of milk.

Q Well, there not being any profit involved, Mr. Todd, would you explain why you handled or handle the product?

A It is a very staple product, very much in demand, and it is just a very competitive item.

MR. LUKINGBEAL:

Off the record if we may, sir.

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

By Mr. Coughlin:

Q Mr. Todd, between January 1956 and March 1958, did the Borden Company at any time offer you a private label evaporated milk?

A No, sir.

Q Well, if during that period or especially in March of 1958, if the Borden Company had offered you a private label evaporated milk at a price approximating

\$5.25 per case for tall, would you have been receptive to such an offer?

A Yes, sir.

[628] Q What is that, Mr. Todd?

A Well, with the quality of the milk and at the time milk was becoming a little more competitive in this particular area, I would have been very happy to buy the milk.

Q Are you familiar with the retail operations of your member stores? Do you know the way in which they merchandise, the general prices charged by them for various products such as evaporated milk?

A They also handle many grocery items; I am not too familiar with the pricing structure on all of them.

Q But consistently over this period I believe you stated on the record that you have had a demand for evaporated milk?

A Yes, sir.

Q Have your members ever approached you with regard to obtaining evaporated milk at a price less than that which you pay?

MR. LUKINGBEAL:

Well now, your Honor, I would suppose that his members would always be willing to buy anything at a price less than they pay.

MR. COUGHLIN:

Why don't we ask him?

HEARING EXAMINER LIPSCOMB:

What was the question? I didn't quite get it.
(Question read.)

HEARING EXAMINER LIPSCOMB:

I see no objection to the question. You may answer.

[629] MR. COUGHLIN:

Thank you, your Honor.

A No, sir, they have not approached me along that line. I know they could have used it but they didn't approach me.

By Mr. Coughlin:

Q All right.

Mr. Todd, with what other wholesale grocery houses in the City of Charlotte are you in competition?

MR. LUKINGBEAL:

I will object to that question.

HEARING EXAMINER LIPSCOMB:

I believe he is rephrasing the question.

Are you?

By Mr. Coughlin:

Q What other wholesale grocery houses, I know your Association, but —

MR. LUKINGBEAL:

Yes, and that is the basis of my objection, Mr. Coughlin. This witness has testified that he is an officer of an Association which has a certain membership which I would suppose is quite a different thing from wholesaler.

MR. COUGHLIN:

Yes, it is. I should rephrase the question with that in mind.

MR. LUKINGBEAL:

All right.

By Mr. Coughlin:

Q Mr. Todd, do you know the names of other wholesale grocery companies in the City of Charlotte?

[630] A Yes, sir. Thomas & Howard Company, Charles Moody Company, L. W. Petrie and J. D. Whiteside.

Q Thank you.

Mr. Todd, pursuant to my request did you furnish me with information detailing the dollar volume of purchases and sales for all products handled by your Association for each of the years 1956 through 1958?

A Yes, sir.

Q Now, I notice in your figure for 1958 you have omitted to state to what period that figure goes. It obviously isn't for the entire year. How long —

A From April 1, 1958 up to the date of that letter.

MR. COUGHLIN:

Your Honor, at this time I would like to have marked for identification as Commission's Exhibit 2238 —

HEARING EXAMINER LIPSCOMB:

It will be marked as requested.

MR. COUGHLIN:

(Continuing) — this information referred to.

(The document referred to was marked Commission Exhibit 2238 for identification.)

By Mr. Coughlin:

Q And I notice also on Commission's Exhibit for identification 2238 besides the purchases and sales for all products for these three years you have for the same period detailed [631] the purchases of tall and small Borden brand evaporated milk, is that correct?

A That is correct.

Q Mr. Todd, for purposes of clarification of the document identified as Commission's Exhibit No. 2238, do you maintain the books of your Association on a fiscal year or a calendar year basis?

A Fiscal year.

Q And for what period does your fiscal year run?

A April 1 to March 30.

Q Then, in other words, all the figures represented here for your dollar purchases and dollar sales for the year 1956 run from April 1, 1956 through March 31, 1957?

A That is correct.

Q And for 1957 would be April 1, 1957 through March 31, 1958, is that correct?

A That is correct.

Q Now, I notice also down here, Mr. Todd, that you have not stated years with regard to the figures you provided on purchases of Borden brand evaporated milk. The first column over here which I will read into the record so it will be clear later, reads: tall, 5100, \$32,932.50.

Then appearing directly thereunder is b a b y, 535, \$3,896.25, is that correct?

A That is correct.

[632] Q Now, to what year does that relate?

A The year 1956.

Q I see.

Then, indented thereunder is tall, 7800, \$51,480. And baby, 900, \$5,940. To what year does that relate?

A 1957.

Q '57?

A That is correct.

Q Then, indented again thereunder is tall, 3375, and then an abbreviated "CS", cases?

A Cases.

Q \$23,595; and then in the line immediately thereunder is baby, 335, \$2,210. Then that is for the year 1958, Mr. Todd?

MR. LUKINGBEAL:

I will object to this last question, your Honor, unless it is understood that the question relates only to explaining a document which has been marked for identification and which has not yet been offered into evidence, my point being that this request is directed — which relates exclusively to the period since March 31, 1958.

MR. COUGHLIN:

Your Honor, I haven't attempted to offer this document into evidence. All I am doing is getting an explanation.

MR. LUKINGBEAL:

My objection only goes to the fact that this is not eliciting testimony of the witness [633] but is only explaining a document which has so far been marked for identification.

MR. COUGHLIN:

I want that understood. I believe it appears on the record that I was only questioning Mr. Todd pertaining to the information on this document, Commission's Exhibit 2238.

HEARING EXAMINER LIPSCOMB:

All right.

By Mr. Coughlin:

Q Mr. Todd, I will ask you further regarding this document whether these figures representing the purchases of Borden brand evaporated milk, tall and small for each of the years you have just mentioned are computed on the basis of your fiscal year period?

A That is right.

Q So, in other words, for the year 1956 it would be April 1, 1956 through March 31, 1957, and so on for each year?

A That is right, sir.

MR. COUGHLIN:

Your Honor, at this time I would like to offer into evidence Commission's Exhibit for identification No. 2238.

* * * *

By Mr. Lukingbeal:

Q Mr. Todd, you mentioned during your direct examination that none of your members of your Association have ever asked the Association to get a private label evaporated milk for them. I take it that it follows from that that the Association never asked the Borden Company to pack a private label evaporated milk?

A That is correct, we never asked them for a private label [636] milk.

Q And I don't suppose the Association has ever asked any other evaporated milk producer to pack a private label for the Association?

A No, sir; we have not.

Q You know Mr. Hartley of the Borden Company's Atlanta office, don't you, sir?

A I know of Mr. Hartley, I don't know if I know him personally.

Q I see. You don't see him from time to time?

A Not too often.

Q Occasionally you see Mr. Hartley?

A I doubt if I would recognize him.

Q All right, sir.

You had a member of your Association back in the early months of this year and in the earlier years named Harris Supermarkets, is that correct?

A That is correct.

Q And I believe if my information is correct that Harris Supermarkets was handling a private label of evaporated milk, is that correct, sir?

A I don't know.

Q Well, under the arrangements between the Association and its individual members there is no rea-

son why the individual members can't go elsewhere to buy particular items if they [637] want to, is that right?

A That is correct; they can, yes, sir.

Q And they do, I suppose, some of them?

A Yes, sir.

Q Do you happen to know whether any of your members are handling any private label evaporated milk?

A No, sir, I don't know of any.

Q You just don't know whether they do or not?

A I don't know whether they do or not; no, sir.

* * * *

[638] Q Mr. Todd, I suppose your Association handles a large number of different grocery items, is that correct?

A Yes, sir.

[639] Q And those include items such as coffee, for example, which generally speaking in the market are available both in advertised brands and in private labels, is that right?

A Do I handle both of them?

Q I am not asking now whether you handle both, but simply whether you have items such as coffee which are generally sold in the market both as advertised brands and as private labels?

A I handle the advertised brands.

Q I see. You don't handle private label merchandise, is that correct?

A About four or five weeks ago we stocked a control label of flour, dry dog food and some liquid detergents.

Q I see, but you are not doing that now?

A We do, I mean we have just stocked them about four or five weeks ago.

Q You just started?

A Yes, sir, about four or five weeks ago.

Q Mr. Todd, if I understood you correctly the Association in respect of its purchases of Borden brand evaporated milk from the Borden Company gets the 2 per cent cash discount?

A That is correct.

Q And the Association keeps that; in other words, you invoice your individual members for the \$6.60 without any discount?

A That is correct, sir.

[640] Q Is it the purpose or objective of your Association to make a profit on its transactions with its members?

A No, sir, it isn't the policy to try to make a profit.

Q Mr. Todd, the counsel in support of the complaint asked you a hypothetical question as to whether you would have been receptive to an offer of private label evaporated milk at \$5.25 a case and although none of your members have ever asked you to get a private label and you never made any efforts to get any, you said that you would have been because of what you would have thought to be the possibility of making some greater profit on it.

MR. COUGHLIN:

Pardon me, Your Honor, I don't mean to interrupt counsel but I think he is drawing a conclusion in this question that is not warranted by a statement on the record. I don't think he mentioned anything about

making a profit on it. I think he mentioned other reasons for wanting a private label. I didn't want to interrupt.

MR. LUKINGBEAL:

I certainly have no intention, Your Honor, of stating it any differently.

May I try to rephrase the question and see if I can say the record the way Mr. Coughlin thinks it is on the record.

By Mr. Lukingbeal:

Q Mr. Todd, perhaps you will tell us again what would have been your reason for being receptive to an offer of [641] a private label at \$5.25?

A Well, we would have considered it very, very seriously based on the quality of the milk and the difference in price. To my knowledge I don't know of any milk, evaporated milk that would have been available at that price at that time.

Q Well, I suppose the Association as such would not have expected to make any particular amount of profit on it; in other words, you would have sold it to your members on a very modest mark-up, is that correct, sir?

A We would have sold it—yes, sir.

Q Now, in turn would you have expected that your members would have resold merchandise of that kind for the same prices that they were getting for the Borden brand evaporated milk?

A I wouldn't think so.

Q You would have expected the price charged by your members out of their stores to be substantially lower?

A Yes, sir.

Q And why is that, sir?

A Well, the retailer in my opinion bases his prices mostly on his cost and I presume it is looking for an overall mark-up and that is about all I can say at the moment.

Q Are you familiar, sir, with the prices at which private label merchandise in the grocery field generally sells as [642] compared with the prices commanded by the advertised brands?

A Not until recently when I noticed that some private label milks were being advertised at about ten cents a can.

Q As compared with about what on the three advertised?

A About fifteen cents.

* * * *

[647] Thereupon,

ROBERT HILLERY PETRIE

was called as a witness for the Commission and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Coughlin:

Q Mr. Petrie, will you please state your full name and home address?

A Robert Hillery Petrie, 2146 Crescent Avenue, Charlotte 7.

Q Is that C-r-e-s-c-e-n-t?

A C-r-e-s-c-e-n-t.

Q Mr. Petrie, with what organization are you associated?

A L. W. Petrie, Inc., wholesale grocery.

Q Where is it located?

A It is located at 323 South College Street.

Q In Charlotte?

A Charlotte, North Carolina.

Q Mr. Petrie, would you name the other wholesale grocers [648] also located in Charlotte?

A Thomas & Howard Company, Charles Moody Company, J. D. Whiteside, Jr., Inc.

Q What type of customers purchase products from your concern, Mr. Petrie?

A Practically all of our business is done with the independent grocery, but we do call on restaurants, cafes, institutions.

Q But your customers are primarily independent retail grocers, is that correct?

A That is right.

Q Where are they located primarily?

A Within approximately a radius of thirty-five miles or so.

Q Including the City of Charlotte?

A Yes, sir.

Q Are your customers in competition with the larger retail grocery chains?

A Yes.

Q What are those chains?

A Winn-Dixie is in this location, A&P, Colonial Stores. And Harris is, of course, considered a chain.

Q Harris, is that H-a-r-r-i-s?

A That is right.

Q Mr. Petrie, do you buy canned evaporated milk from the [649] Borden Company under its Silver Cow label?

A Yes.

Q How long have you purchased this product approximately?

A That would be a rough guess; I would say at least ten years or more.

Q What price did you pay for Borden brand evaporated milk in March of this year, Mr. Petrie?

A \$6.60.

Q And at what price did you sell this product to your customers?

A The old mark-up on the milk is \$6.68.

Q And 8-cent mark-up from cost?

A No, I said \$6.68. I stand corrected on that, it is \$6.88 but the largest majority of it is sold for \$6.65, and \$6.70.

Q Well, if you could break that down for us if you would, please.

Now, what percentage of your sales of Borden brand evaporated milk are sold at \$6.65 a case?

A Approximately half of it.

Q And then I believe you mentioned a figure of \$6.70?

A That is right.

Q What percentage of your sales of Borden evaporated milk were sold at that figure?

A Approximately the other half.

[650] In other words, it would depend on how the man pays his bills.

Q In other words, the customer who paid promptly or your customers in good standing had an opportunity to buy this product from you at \$6.65 a case?

A That is right.

Q Mr. Petrie, the five cent mark-up that you will make on half of the cases of Borden brand evaporated milk which you sold in March which you now sell—do you still sell at that figure?

A Yes.

Q Is that sufficient to cover your overhead and handling costs, Mr. Petrie?

A No.

Q Is the \$6.70 sufficient to cover your overhead and handling costs?

A No.

Q Mr. Petrie, do you get a 2 percent discount from the Borden Company?

A Yes.

Q Now, you mentioned that the five cents and the ten cents differential were not enough to cover your overhead and handling costs. Would that statement also be so if you took into account the 2 percent discount that you received?

A No.

[651] Q Do you mean the statement would not be so, do you realize a profit through the 2 percent?

A No, sir, you wouldn't.

Q In other words, you don't realize any profit in the sale of your evaporated milk?

A We figure that all the milk we sell is sold at a loss.

Q Then why do you handle the product, Mr. Petrie?

A We feel like we can't do without it.

Q Can you explain that a little more? Is there a customer demand?

A Well, it's—well, I am speaking of milk as a whole.

Q Well, I would like you to confine yourself if you would, please, to evaporated milk.

A Well, of course, that is the only milk that we carry in the wholesale grocery house would be evaporated milk and condensed milk, no fresh milk.

Q I see.

A But it is an item that is considered a necessity in the wholesale grocery business.

Q You have a constant demand for it from your customers?

A That is right, practically everybody that we call on.

Q Mr. Petrie, between January 1956 and March 1958 did the Borden Company offer you a private label canned evaporated milk?

A No.

[652] Q During that period did you handle any private label evaporated milk?

A No.

Q Do you handle one now?

A No.

Q If you had been offered by the Borden Company a private label evaporated milk at approximately \$5.25 per case for tall, would you have been receptive to such an offer?

A Yes.

Q Will you explain why, sir?

A It would give us a chance to make a little bit more profit off of it.

Q What kind of mark-up would you make on your private label evaporated milk when selling per case as compared to your brand label evaporated milk?

A It would run between 25 and 50 cents a case.

Q You would make-up to that?

A Yes.

Q Do you think if you were able to mark up to that price some profit could be derived therefrom?

A Yes.

Q Would there be any other consideration motivating you to handle private label besides personal profit to you? I am directing myself primarily to an accommodation to your customers, for example?

[653] A Yes, there would be a definite advantage as far as the customer was concerned. There would be a reduced price to the man that was buying it just for his own personal use within his own organization such as an institution and it would be a cheaper retail price for the independent merchant.

Q Have you ever had any of your customers inquire about obtaining an evaporated milk at a price less than that which you have been charging per case?

A Yes, we have had inquiries through our salesmen.

Q Based upon those inquiries have you attempted to lower the price for your brand of evaporated milk to meet this inquiries or requests?

A No, we have not reduced our price on milk because of those inquiries.

Q Why haven't you reduced it?

A Well, we feel like we are selling it at a loss or as an accommodation now.

Q So, in other words, you couldn't sustain a further loss to accommodate the requests?

A We have been approached on that subject but we have turned it down flat.

Q Have you had numerous requests?

A Well, there is a certain amount of cost-plus selling being done.

Q But, in other words, what I am attempting to determine, [654] sir, is this request for a lower price evaporated milk is not an isolated instance, it has happened on a number of occasions?

A Oh, yes.

Q Thank you.

Then you would say perhaps based upon that that you find your customers to be somewhat price conscious?

A Very definitely so.

MR. COUGHLIN:

May I go off the record, please, your Honor?

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

MR. COUGHLIN:

Your Honor, at this time I would like to have a document marked for identification as Commission's Exhibit 2239.

* * * *

By Mr. Lukingbeal:

Q Mr. Petrie, do you also handle Pet and Carnation evaporated milk?

A Yes.

Q Those along with the Borden brand are the only kinds of [658] evaporated milk you handle, is that right, sir?

A I'd like to ask a question. What is Sunshine Milk? It is some type of milk, but is it evaporated milk?

Q Evaporated skim.

A That is right.

Q You also handle then the Sunshine evaporated skim milk, is that right, sir?

A Yes, sir.

Q Mr. Petrie, do you handle any private label goods of kinds other than evaporated milk?

A Now, you mean by that merchandise packed exclusively for ourselves?

Q That is right.

A With our own label?

Q That is right.

A No, sir.

Q You handle the advertised brands of the different items that you carry such as coffee, flour, and so on?

A Well, in practically every case we have advertised brands and non-advertised brands. They are the same thing in duplication and in competition with each other.

Q Well, by the non-advertised brand can you tell us a little more what you mean, Mr. Petrie?

A Well, say, for example, you have a packer that packs corn but he's not a nationally advertised label. So we'll [659] perhaps buy his label of corn so that we would have a different price to satisfy more customers, in other words.

Q I see.

You find then, I take it, that the advertised brands of merchandise in the grocery trade generally sell higher than the unadvertised ones, is that your point?

MR. COUGHLIN:

Excuse me. Could we have clarification on that? Do you mean higher in price or volume?

MR. LUKINGBEAL:

Higher in price, I mean.

A Higher in price, yes.

By Mr. Lukingbeal:

Q Mr. Petrie, have you ever asked the Borden Company to pack a private label evaporated milk for you?

A To answer your question with a Yes or No answer I would have to say No.

Q Well, is there any question about it? If there is please tell me.

A There is a question in my mind. We have asked their local broker if there was any arrangement for private label milk available and they said No.

Q Did they say No, or that they didn't know about the private label situation?

A They said it was not available through their office.

Q The broker's office?

A That the private label business was all handled through [660] their main office.

Q I see. And you did not make any inquiry of Borden's main office or any other Borden representative?

A No.

Q You mentiond, Mr. Petrie, that your customers have complained to you about the prices that you are now and have been charging them for the kinds of evaporated milk that you have been carrying. They would like to have it cheaper, if I understood you correctly?

A Well, to use the word "complain" would be pretty stiff because that is part of buying, of course, is to complain about the price.

Q They would like to have a lower price for Borden brand and the other things you carry?

A Well, you get that to a certain extent they would like to buy something a little bit cheaper.

Q Have your customers asked you to obtain a private label evaporated milk for them?

A No.

Q You mentioned that you had had a little discussion about evaporated milk with a broker. Have you made any inquiries of any other producers of evapo-

rated milk with regard to getting a private label packed for you?

A Several years ago we approached them all on the general terms of private label milk and none of it was available through the local brokerage houses.

[661] Q Through local brokers representing other producers?

A Carnation is represented by a broker and Pet is represented by their own representative.

Q I see.

You are aware, of course, that besides Borden, Carnation and Pet, there are other producers of evaporated milk?

A Oh, yes.

Q Did you approach any of those other producers with regard to a private label evaporated milk?

A No.

Q You mentioned, I believe, that it was several years ago that you had inquired of brokers regarding — that is of some brokers representing Pet and Carnation regarding private label evaporated milk. Was it at that time that you approached the brokers representing Borden in this area?

A Yes.

Q What was the business circumstance, Mr. Petrie, that led you to inquire about private label evaporated milk several years ago?

A Well, you can sum that up with one word: "profit."

Q Well, do I understand correctly that it was your business judgment several years ago that at that time in this market private label evaporated milk was a factor and you were then making inquiries to ascer-

tain whether your company could [662] obtain a private label to meet competition of other private labels at that time?

A That is correct.

Q Mr. Petrie, in responding to Mr. Coughlin's hypothetical question about what you would have done in March of this year if you had been offered a private label evaporated milk at I believe Mr. Coughlin said \$5.25, you mentioned among other things that you would have expected to resell such a product at a mark-up of 25 to 50 cents a case?

A That is correct.

Q I take it you meant resell it to your customers in the retail trade, is that right, sir?

A Well, it would be both retail and institutions.

Q I see.

Well, turning first to your customers in the retail trade, I wonder if you could tell us a little, Mr. Petrie, about the nature of the services that are performed by an organization such as your own, a wholesale grocer, in return for which you obtain a mark-up on the goods you sell?

A Well, we offer a sales force and a delivery service and a warehouse and we do give credit.

Q I take it that you would consider that those are necessary economic services in getting the goods to the consumer?

A Well, let's put it this way: that it is in our particular [663] business but there are still other forms of doing business. Some of those services could be eliminated. We just don't happen to be in that particular type of business.

Q But in the type of business you are in and bearing in mind the nature of the businesses that are conducted by your customers you don't have any question, do you, that the services you render are necessary, economic services?

A Yes, we consider them necessary.

MR. LUKINGBEAL:

That is all, sir.

MR. COUGHLIN:

One question if I may, your Honor.

REDIRECT EXAMINATION

By Mr. Coughlin:

Q I believe you mentioned during cross-examination by Mr. Lukingbeal, Mr. Petrie, that you had attempted or you had contacted the Borden broker in the area with regard to obtaining a private label evaporated milk. In the purchase of your products generally, Mr. Petrie, do you buy your products through a broker or do you buy them as a result of direct contact with the home office of the corporation or the manufacturer selling the product? I mean what is the general policy?

A A lot of your manufacturers are represented by brokers.

Q Well, would you tell us whether you deal through a broker in those situations where a broker represents a particular manufacturer in this area?

[664] A Oh, yes, if they are represented by a broker why we deal with the broker.

Q And not directly with the home office of the manufacturer?

A No.

MR. COUGHLIN:

Thank you. That is all I have.

* * * *

[675] ANDREW JACKSON BERRY, JR.
was called as a witness for the government and, previously having been duly sworn, was further examined and testified as follows:

* * * *

DIRECT EXAMINATION

By Mr. Hays:

Q Mr. Berry, I direct your attention to Commission's Exhibit 2116 (showing document to the witness) and to the column on that exhibit which is headed, "Total Cost."

Will you tell me what that means? Is that the price paid by the buyer?

A The column "total Cost" represents the sum total of all the components that go to make up the f.o.b. plant price.

Q In other words, you have used cost in the sense of price insofar as the buyer is concerned?

A That is correct.

* * * *

[676] Q Now, that is true also of the following exhibits: 2118, 2120, 2122, 2124, 2126—

* * * *

Q (Continuing) 2128, 2130, 2132, 2134, 2136, 2138, 2140, 2142, 2144, 2146, 2148, 2150, 2152, 2154, 2156, 2158, 2160, 2162, 2164, 2166, 2168 — is that likewise true of those numbered exhibits?

A Yes, sir.

* * * *

[681] MR. HAYS:

Your Honor, during the recess we have marked with Commission's exhibit numbers a series of tabulations. **[682 & 683]** I would like to read their identifications into the record with your permission.

HEARING EXAMINER LIPSCOMB:

You may do so.

* * * *

MR. HAYS:

As Commission's Exhibits 5143 through 5159, a tabulation entitled "Private Label Shipments from Albany, Oregon Plant, Tall 48's."

HEARING EXAMINER LIPSCOMB:

Those are Exhibits 5143 through 5159 in consecutive order?

MR. HAYS:

Yes, your Honor.

(The tabulation referred to was marked Commission's Exhibits 5143 through 5159 for identification.)

[684] MR. HAYS:

For identification as Commission Exhibits 5160 through 5173, a tabulation referring to private label shipments from Chester, South Carolina plant, Tall, 48's;

For identification as Commission Exhibits 5174 through 5180, a tabulation referring to private label shipments from Dixon, Illinois plant, Tall, 48's;

For identification as Commission Exhibits 5181 through 5201, a tabulation referring to shipments of private label milk from Ft. Scott, Kansas, Tall, 48's;

For identification as Commission Exhibits 5202 through 5221, a tabulation referring to private label shipments from Leesburg, Tennessee plant, Tall, 48's;

As Commission Exhibit 5222, a tabulation referring to private label shipments from Modesto, California plant, Tall, 48's;

For identification as Commission's Exhibit 5223 and 5224, a tabulation referring to private label shipments from New London, Wisconsin plant, Tall, 48's;

As Commission's Exhibits 5225 and 5226, a tabulation referring to private label shipments from Parrington, Michigan plant, Tall, 48's;

As Commission's Exhibits 5227 through 5233, a tabulation referring to private label shipments from Wellsboro, Pennsylvania plant, Tall, 48's;

[685] As Commission's Exhibits 5234 through 5237, a tabulation entitled "Borden shipments from Chester, South Carolina, to various points where private label shipments were made."

As Commission's Exhibits 5238 through 5242, a tabulation referring to shipments of Borden label from Albany, Oregon plant, Tall, 48's;

As Commission's Exhibits 5243 through 5248, a tabulation referring to shipments of Borden label from Chester, South Carolina plant, Tall, 48's;

As Commission's Exhibits 5249 through 5253, a tabulation referring to shipments of Borden label from Dixon, Illinois plant, tall, 48's;

As Commission's Exhibits 5254 through 5257, a tabulation referring to Borden label shipments from Elkland, Pennsylvania plant, tall, 48's;

As Commission's Exhibits 5258 through 5262, a tabulation referring to Borden label shipments from Ft. Scott, Kansas, Tall, 48's;

As Commission's Exhibits 5263 through 5270, a tabulation referring to Borden label shipments from Leesburg, Tennessee plant, Tall, 48's;

As Commission's Exhibits 5271 through 5275, a tabulation referring to shipments of Borden label from Modesto, California, 48 Talls;

[686] As Commission's Exhibits 5276 through 5280, a tabulation referring to shipments of Borden labels from New London, Wisconsin plant, Tall, 48's;

As Commission's Exhibits 5281 and 5282, a tabulation referring to Borden label shipments from Parrington, Michigan plant, Tall, 48's;

As Commission's Exhibits 5283 and 5284, a tabulation referring to shipments of Borden label from Wellsboro, Pennsylvania plant, Tall, 48's;

As Commission's Exhibits 5285 through 5295, a tabulation entitled "Private label price computation."

(The documents referred to were marked Commission Exhibits for identification 5160 through 5295.)

* * * *

【687】 Thereupon,

MELBOURNE C. STEELE

was called as a witness for the Commission and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Hays:

Q Will you state your full name, please, sir?

A I am Melbourne C. Steele.

Q And what is your home address, sir?

A Chevy Chase, Maryland.

Q And where are you employed, sir?

A At the Federal Trade Commission.

Q How long have you been employed there?

A Since 1929.

Q What is your present position there?

A I am assistant chief accountant.

Q How long have you been assistant chief accountant?

A Since 1955.

Q Mr. Steele, I direct your attention to Commission Exhibits 5143 through 5159, and ask you if you recognize these documents as certain tabulations which I asked that you have prepared for me? (Handing documents to the witness.)

[688] A Yes, I do.

Q Will you tell us the part you played in the preparation of those exhibits?

A I laid out the form of the exhibits, I did some of the work myself, I was assisted by four other accountants of the accounting division in the tabulations.

Q Who were those accountants?

A There was William H. England, Glenn Peck, John Steadman and Lawrence Wigby.

Q What degree of supervision did you exercise in the preparation of these exhibits?

A I instructed each of these men what work to do and then after they turned the work over to me I went over and spot-checked the computations and thoroughly checked the principles and methods of work.

Q I direct your attention once again to Commission's Exhibits for identification 5143 and 5159 and ask you to tell me exactly what each of the headings appearing thereon means and where the information under each of the headings was derived?

A The first figures in the first column under Commission's Exhibit come from those exhibits which are in the record in this case.

In the second column under the heading "customer" appears the name of the customer which was on the exhibit [689] opposite that name. Under the heading "Destination" is the location of the customer as shown on that exhibit. The date shipped in the fourth column comes from the exhibit. The Borden order number in the fifth column also comes from the same exhibit. The number of cases in the sixth column are taken from the exhibit, and the price per case, in the seventh column is likewise taken from the exhibit.

In the eighth column is shown the amount which represents the total amount of the sale of those cases which was also taken from the exhibit. The next column is shown the cost of the labels applicable to the number of cases and was also taken from the exhibit. The freight in the next column was taken from the exhibit. And the total amount in the next column was taken from the exhibit if this were the total number of cases shown on that exhibit; if there were other cases such as small 48's or small 96's this represents a computation made by us.

In the next column under the heading "Private Label Total Per Case," that is the computation prepared by us and represents the total amount shown in the preceding column divided by the number of cases shown in the sixth column.

The figures shown under the heading "Borden Label Price" were taken from Mr. Berry's testimony earlier in this proceeding and were applied to the specific period that [690] the invoice was dated.

And in the final column is shown the difference in price difference between the Borden label price and

the private label total per case in the two preceding columns.

Q I also direct your attention to the remainder of that tabulation which goes through Commission's Exhibit 5159 and a number of other tabulations which go through Commission's Exhibit 5222 and ask if all of these exhibits were prepared in the same manner as you have testified with reference to Commission's Exhibits 5143 through 5159?

A Yes, sir, wherever the information was available. In some cases, Mr. Hays, the price per case was not shown on the Commission's exhibit from which the data was obtained.

Q Does that mean that you did not put the price per case in, then, on your tabulations?

A That is correct; may I make a second qualification? In some cases the freight wasn't shown and where the freight wasn't shown as applicable to that shipment, if we could obtain it from other sources we made a computation of the freight, otherwise the amount of freight under the heading "Freight" was not entered in this record.

Q In other words, directing your attention to Commission's Exhibit for identification 5143 at the bottom of the page there are blank spaces in certain of the last five columns under the heading "Freight"; that indicated that you did not [691] have the freight on that shipment so you did not put it in, is that correct?

A That is correct.

* * * *

[736] Q I direct your attention to Commission Exhibit for identification 5238 and ask you to examine it and explain what appears thereon and how the figures were derived?

A Commission's Exhibit 5238 represents shipment of Borden label Tall 48's from the Albany, Oregon plant, various **[737]** customers and destinations.

In the first column of this shipment is shown reference numbers which refer to certain numbers placed on the reverse of these exhibits by the respondent as the exhibits had not been numbered at the time.

Q Numbered as exhibit numbers, the first column or numbers placed on these by the Borden Company when they submitted them to us?

A That is right.

Q That is their reference number, is that correct?

A Yes, sir.

Q Thank you.

A In the second column is shown the name of the customer.

In the third column is shown the location of the customer or the destination of the shipment.

In the fourth column is shown the date shipped.

Fifth column is shown the Borden order number. And each of these data that I have referred to comes from the Borden invoices referred to in the reference number on the same line as the shipment.

In the sixth column is shown the number of cases.

The seventh column is shown the delivery price per case, which comes from the invoice.

In the eighth column is shown the total sales amount, which also comes from the invoice.

[738] In the ninth column is shown the price

freight which comes from the freight waybill which was attached or which we have matched up with the invoice.

Q And which is referred to also, the freight waybill in the first line would be Borden reference No. 5723, is that correct?

A 5727.

Q 5727, yes.

A In the tenth column under the heading "Net sales amount f.o.b. plant", is a computation made by us after deducting the amount of the freight from the sales amount shown on the invoice.

In the eleventh column under the heading "Borden net per case f.o.b. plant", is a computation made by us showing the average amount or price which is derived by dividing the net sales amount f.o.b. plant by the number of cases.

In the twelfth column is shown the private label price, f.o.b. plant, which we computed from other data obtained from the record.

And in the thirteenth column is shown the price difference between the Borden price f.o.b. plant and the private label price f.o.b. plant.

Q Mr. Steele, I notice that on the first line of 5238, Commission's exhibit for identification, and in the left-hand [739] months column there are two numbers appearing thereon. These have been referred to as Borden reference numbers.

Now, the first number, starting from the top down, the first number applicable to Hudson House is 3755, That refers to an invoice, is that correct?

A Yes, sir.

Q And the second number, 5727, refers to a freight bill, is that correct?

A Yes, sir.

Q Now, I note that all through this series of exhibits, Commission's exhibit for identification 5238 through 5284 there are two such numbers appearing on each line where you have made any type of copying or computation.

Is it always true that you have attempted to put in the left-hand column as the first figure the invoice and as the second figure the freight bill?

A That is correct.

Q Am I correct in saying that the twelfth column counting from the left headed "Private label price, f.o.b. plant", and is the only column containing figures which are not directly obtainable from the record reference applicable either by copying or by simple mathematics?

A Yes, sir, that is right.

* * * *

[741] Q Is it true that the description which you have applied to Commission's exhibit for identification 5238 is applicable as well to Commission's exhibits for identification 5239 through 5295? In other words, they are the same type of tabulations as you have described, is that correct?

A That is correct.

Q I did make a slight mistake on the record reference; instead of 5295 it should be 5284.

5285 through 5295 is another type of tabulation, is that not correct?

A Yes, sir.

* * * *

[748] MR. HAYS:

Your Honor, I come now to a fourth type of tabulation which is encompassed in Commission's Exhibits for identification 5285 through 5295.

By Mr. Hays:

Q Am I correct in stating, Mr. Steele, that this series of exhibits has application to Commission's Exhibits for identification 5238 through 5284 and more specifically to the columns appearing on those exhibits headed "Private Label Price, f.o.b. Plant," and "Price Difference," those are the last two **[749]** columns on those exhibits; is that correct?

A Yes, sir.

Q I hand you Commission's Exhibits for identification 5285 through 5295 and ask you to explain first just what is represented on these exhibits?

A These exhibits show by months from January 1956 through March 1958, as shown by Commission's Exhibits in the record the composition of the private label price, and by composition I mean the detail wherever it was available, of how the Borden Company computed that price, including the various elements such as cost of milk, cost other than milk, the hauling cost, the carton cost, the label cost, all of which made up a total price to the private label customers. These exhibits are set up by Borden plants

and in some cases by customers because some slight difference in the charge for cartons or for labels, or for hauling, making a small difference in the total price to the private label buyer in the same month from the same plant.

Q Now, if I understand your testimony correctly, all of the figures as a general rule, subject to a few exceptions which I will get to later, all of the figures appearing on Commission's Exhibits for identification 5285 through 5295 were either taken off of exhibits of record in this case or are the result of simple mathematical computations, additions or subtraction, and the like which was done from exhibits of [750] record in this case; is that correct?

A All of the figures on these exhibits were taken from other exhibits in the record, without exception.

* * * *

[765] MELBOURNE C. STEELE resumed the stand as a witness for the Commission and testified as follows:

CROSS EXAMINATION

By Mr. Wood:

Q I think I will begin with some questions about the computations on the Borden label sales. They are the ones that begin with Commission's Exhibit 5238 for identification.

First, just some background questions about this [766] set of exhibits and just to complete the record, I will say that the Borden label tabulations are through Commission's Exhibits 5284 for identification.

It's correct, isn't it, Mr. Steele, that these tabulations do not relate to the whole of the business of the Borden Company in the sale of Borden label products during the period involved in this case?

A That's correct. It's limited entirely to the invoices which were supplied to us by the Borden Company for certain shipments.

Q The ones that we were asked to supply with respect to Borden label had to do with shipments to customers in towns as to which there were private label shipments, is that not correct?

A That is correct.

Q So that shipments of Borden label products to areas other than those to which private label shipments were made are not included here?

A That is correct.

Q Is it also true that with respect to the areas covered by this series of Borden label tabulations, some of the transactions during the period in question are not covered by the tabulations?

A I am not sure I understand you, Mr. Wood. You mean some of the shipments during that period to these same des [767] tinations?

Q Yes, sir.

A That is correct.

Q The tabulations relate only to direct shipments, do they not?

A Yes, sir.

Q That is to say, shipments from the Borden Company directly to the customer without the goods going through a warehouse?

A That is correct.

* * * *

[768] Q But as to some of the towns, there were shipments of Borden label products during the period covered by your tabulations, which went through factory relief storage warehouses?

A Yes, sir.

Q And those transactions are not reflected in your tabulations, are they?

A No, sir.

Q Were there not also shipments of Borden label products to some, at least, of the towns covered by your tabulation and during the period covered by your tabulation which went through consignment warehouses?

A I wouldn't know about that, Mr. Wood.

Q As to the shipments that went through factory relief storage warehouses, you would expect, would you not, that freight and storage charges would be greater than in the case of direct shipments?

A Yes.

Q So that the omission of the shipment through factory relief storage warehouses, as omitted shipments, the effect **[769]** of which, if included, would be to show smaller differentials than are reflected in the exhibits?

A That's a matter of opinion and in my opinion these went through what we called cold storage warehouses and —

Q Does the temperature affect the answer?

A Well, yes, it does — not exactly the temperature, sir, but the fact that it was stored at other than the producing plant. It was at the option of the respondent so any additional expense that was incurred was not necessarily a delivery expense but was — would

more likely be termed a storage expense which the respondent, in my opinion, could have incurred possibly at their own producing plant, rather than at some intermediate point.

* * * *

【771】 Q Now, if you look at Commission Exhibit 5238 for identification, you see about the middle of the page a column headed **【772】** "Delivered Price Per Case."

Do you see that column?

A Yes, sir.

Q And in that column you entered the price as reflected on the invoice covering the shipment of the Borden label product, is that correct?

A Yes, sir.

Q I show you Commission's Exhibit 2244 for identification, which is one of the invoices supporting this tabulation.

I ask you whether it is or isn't?

MR. HAYS:

Those are the documents that we don't have, Mr. Wood.

MR. WOOD:

Well, here is a photostat. Here is the one you produced to us.

A Yes, sir, that's correct.

Q That invoice indicates on its face, does it not, that the company, the Borden Company offered two per cent discount for cash within ten days?

A Yes, sir.

Q Was there not a similar discount for cash provided for in each of the invoices underlying Commission's Exhibits 5238 through 5284?

A As far as I recollect, yes, sir.

Q You didn't deduct that discount in arriving at your price or at your computations on price on these exhibits, [773] did you?

A No, sir.

* * * *

[781] Q Now, the cash discount here would amount to something over 13 cents a case, wouldn't it?

A Yes, sir.

Q You wouldn't regard that amount as di minimis in this case, would you?

A I would be bound by the Commission's rulings on that and it has not been found to be substantial.

Q Actually, the use of the gross price rather than the net price affects several of the columns in these Exhibits 5238 through 5284, does it not?

A It affects more than one, yes, sir.

Q Well, let's see. It affects the column headed "Delivered Price per Case"?

A No, sir.

Q Well, the two per cent would be taken off of that figure, wouldn't it?

A And put in an additional column, Mr. Wood.

Q Then it affects the column headed "Sales Amount," does it not?

A Well, my answer would be the same there. No, sir, because the two per cent would be taken off of that figure.

Q Then it affects it, wouldn't it? If it were taken off. That's my point. These are the figures that would be changed if you did it on the net price basis?

A Mr. Wood, I am doing this according to Mr. Hays' instruc- [782] tions, counsel's, Mr. Hays.

I don't say I would do it your way because we are not doing it your way. If you want to do it some other way, I will agree that that's what would happen, yes, sir.

Q I was simply trying to find out what the fact is. I am not suggesting you would do it the way I said. I am sure —

A (Interposing) There is more than one way to do this, Mr. Wood.

Q Well, how would you do it?

A The way I have done it here.

Q No, but if you are going to follow the Taggart Committee report and use the same principles as used in Thompson Products, give effect to the two per cent cash discount, how would you change Commission's Exhibit 5238 for identification?

A In the first place, as I said before, we would not follow the Taggart Committee report in this respect.

Q I said if you were doing it, sir?

A If I were doing it, yes, sir. Then I would —

Q (Interposing) Then what changes would you make in Commission's 5238?

A Then, I would deduct the two per cent cash discount.

Q Where?

A Well, I would think it could have been deducted from the sales amount and a net sales amount shown or sales [783] amount less cash discount. Also, it

would be deducted from the net sales amount f.o.b. plant, from the column headed "Borden Net Per Case, F.O.B. Plant." We would not deduct the two per cent from that, but it would show the effect of that reduction on a per-case basis and also it would affect the last column headed price difference.

* * * *

[784] Q There are some instances, I believe, in which the figure given for the private label price, f.o.b. plant, has been adjusted somewhat from the figure actually shown on the invoice for those goods, is that so?

A Yes. There were some instances in which we added the — a label cost, which was not shown on the invoice.

Q It's true, is it not, that that point comes up because in some cases the Borden Company in connection with its sale of private label goods, it furnishes the label and makes a charge for it to the customer?

[785] A I understand from Mr. Berry's testimony, that is what happened.

Q And some of the invoices so indicate, do they not?

A The invoice just charges them for the labels. I don't know why they do.

Q At any rate, in some instances the invoice charges the customer for the label?

A That's correct.

Q And there are some other invoices where there is no charge to the customer, the private label customer we are talking about, for labels, is that correct?

A Yes, sir.

Q And as to those instances, I take it what you have done is to add a figure for the label which you derived from another source, not from the invoice to the customer, is that correct?

A That's right.

Q And what was your source, where did you get the figure to use?

Perhaps I can help you with that. You went to other invoices for other customers in that area at approximately that time, did you not?

A That is correct.

Q And you found that Customer A, let us say, had paid Borden some eight and some odd fraction cents for labels, [786] so you used the eight and a fraction cents in these cases where you made the adjustment for labels, where there wasn't any label price shown on the invoice, is that correct?

A Yes, sir.

Q Is that what you were referring to in your testimony here the other day on direct examination at Page 751 of the transcript where you said, and I am skipping the first part of the answer.

"In our use of this total price for the comparison with the Borden label price on the series of Exhibits 5238 to 5284 during the months of May, June, July and August, 1957, and February and March, 1958, we added the cost of labels to the figures shown here for the purpose of obtaining a total private label cost fully comparable with the Borden label cost."

Is that the situation you were referring to in that answer?

A Yes, sir.

Q I take it the point, the reason why you need do that in order to get full comparability is that in the case of the Borden label, say, the label is furnished by the Borden Company and no charge made for it as such.

A That is correct.

Q Whereas in the Borden label — I mean the private [787] label transactions you have charges on the labels in certain instances and not in others shown on the invoices?

A Yes, sir.

Q So to make them fully comparable, as you say, you put in an estimated cost for labels in those instances where you were making the adjustment because there was no figure like that in the invoice?

A Yes, sir. Taken from invoices to other customers.

Q You mean that's where you got the figure you put in?

A Yes, sir. The label cost.

* * * *

[790] Q Now, I think I will turn for a moment to the other series of exhibits, the series beginning with the Commission's Exhibit 5143 through 5233, which have to do with private label shipments.

Now, there when you are working out the prices at which the private label shipments were sent out by the Borden Company, you have a column, do you not, — at least in most of the exhibits — headed "Cost of Labels"?

A That is correct.

Q And under that column you show the cost of labels reflected on the invoices whenever there is such a cost reflected on the invoices, is that correct?

A When it was shown separate from the price, Mr. Wood. In other words, if it were shown a part of the price per case, it was not shown in this column, but if it was shown as a separate amount for the total shipment, it was shown [791] in this column. In the other cases it was footnoted on the amount column to indicate the cost was already included.

Q And I take it again, the use of the label costs in this series of exhibits was again designed to produce what you would regard as comparability between the private label and the Borden label, as you testified in the passage I read to you a while ago?

A Well, it was designed to arrive at the total cost, yes, sir. Total price to the customer.

Q And you were trying to arrive at a figure that would be proper to compare with the Borden label figure that you had, were you not?

A Yes, sir.

Q Now, there were some instances, were there not, in which there was no payment for labels indicated on the invoice?

A That is correct.

Q And in those cases, did you adjust for such a figure as you had done in some cases on the Borden brand tabulations?

A No, sir.

Q You didn't do that in any case?

A No, sir.

Q There again, you failed to achieve that comparability that you were talking about in your testimony, [792] didn't you?

A That's right.

* * * *

MR. WOOD:

I ask to have marked for identification a page headed "Entries on the Private Label Tabulation [793] Which Do Not Include Either Actual Label Charges or An Adjustment for Label Charges."

HEARING EXAMINER LIPSCOMB:

That will be marked as requested as Respondent's Exhibit No. 2

* * * *

Q Now, as to the point we have just been discussing, that is to say, the instances in which there is a charge for labels or adjustment for labels, referring to the Borden label series of exhibits, if such an adjustment were supplied, that would affect the figures in the last two columns, would it not, that is to say, the column headed private label price, f.o.b. plant, and the column headed "Price Difference"?

A In those instances, where the label cost was not included, it would, yes, sir.

Q And on the series beginning with Commission Exhibit 5143 relating to private label shipments, the addition of an adjustment for labels in the instances where there has not been such an adjustment, would

affect the figures under [794] the columns headed "Total Amount," the column headed "Private Label Total Per Case" and the column headed "Differential," would it not?

A Yes, sir.

* * * *

[802] Q I want to turn to some questions now about the series of exhibits having to do with private label shipments. They are Commission's Exhibits 5143 through 5233 for [803] identification.

In those exhibits, as I understand it, Mr. Steele, in your third from the last column under the heading "Private Label Total Per Case," you have a figure which does not represent the actual price paid by the private label customer, but rather a computed figure arrived at by making an adjustment for freight, is that so?

A Yes, sir.

Q And then you compare that with the Borden label price as shown in the next to the last column, which is on a delivered price basis which you treat as comparable to the computed delivered price basis for the private label, is that correct?

A Yes, sir.

Q And you arrive at a difference as shown in the last column?

A That is correct.

Q Now here again, isn't it true that in the next to the last column the Borden label price is the gross price and does not reflect the two per cent cash discount which is available to all customers?

A That is correct.

Q And no such discount is available to the private label customers?

A That is right.

[804] Q If this had been set up on the net price basis, the figures in the next to the last column and the last column would be different, would they not?

A If it had been set up that way, that is correct.

Q And that would apply to the whole of this series of Exhibits 5143 through 5233?

A Yes, sir.

* * * *

[817] Q How should the footnote read, and we are talking now about the asterisk footnote on Commission's Exhibit 5167?

A May I take a moment to check this?

Q Certainly.

A I will have to change my answer again because the footnote is correct. It was computed on the rail freight from Chester, South Carolina to Spartanburg, South Carolina.

Q The rail rate for how many pounds?

A Thirty-six thousand pound minimum car.

Q How many cases of talls does it take to make 36 thousand pounds?

A About seven hundred or less.

[818] Q How many cases were there in this shipment?

A A hundred.

Q That would take the LCL rate, wouldn't it?

A Yes, sir.

Q The LCL rate would be something like five times as high, wouldn't it?

A It would be higher. I don't know how much.

Q On the basis of your experience, wouldn't you expect it to be about five times as high?

A Yes, sir. Amend that, I don't know how much higher. It would be higher.

Q And a good deal higher?

A Yes, sir.

* * * *

[824] MR. HAYS:

Your Honor, at this time I offer Commission's Exhibits for identification 5143 through 5295, with the exceptions, two exceptions; a part of 5290 and a part of 5291, that part being those columns on those exhibits headed "cost of milk," "COTM" — that's the second column. "Hauling," "Carton," and "Label" for the reasons — I am not offering those columns because the Commission exhibit referring thereto, a part of it which supports those columns was not offered in evidence.

MR. WOOD:

Mr. Examiner, I object to the receipt of these and I'd like to be heard for a few minutes on my objection.

* * * *

[836] HEARING EXAMINER LIPSCOMB:

Mr. Hays, I am looking at these last two columns. How am I going to know, without a most careful sur-

vey of every exhibit whether this is a correct statement or one of the statements that is erroneous? [837] That is the difference between the Borden label and the private label? How is it to guide me? I assume the purpose of this is to help the Hearing Examiner and the Commission.

* * * *

[842] HEARING EXAMINER LIPSCOMB:

Back on the record.

Your tabulation obviously is made by an advocate and not by a judge, and I don't like tabulations made in that fashion. However, Mr. Steel has testified to a [843] straight-forward analysis, admitted many errors. A number of them. I don't know how many in relationship to the great vast number of exhibits you have in this proceeding. I am sure that, I feel confident at least that his tabulation may be of considerable value. How much, I don't know until I can see it. I can't get it in my hands to really make a study of it until I take it before me in some official way.

I am, therefore, going to receive it in evidence for the purpose of studying it and considering it in the lights of the cross examination and all the other matters, and I will thereafter be able to form a more appropriate judgment of its true merits, but prima facially it is an honest evaluation with defects and as such, I am going to receive it in evidence.

* * * *

[862] Whereupon,

THOMAS HOWARD TIMBERLAKE

was called as a witness for the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

Q Will you please state your full name, sir?

A Thomas Howard Timberlake.

Q And your residence address?

A Columbia, South Carolina, 201 Wateree Avenue.

Q Are you associated with a business organization in Columbia, South Carolina?

A Yes, sir.

Q What is it, sir

A Thomas & Howard Company.

Q What position do you hold with that company, sir?

A I am president of Thomas & Howard Company, Incorporated, Columbia, South Carolina.

Q Is the Columbia, South Carolina, a part of that corporate [863] name, sir?

A Yes, sir.

Q So it is the Thomas & Howard Company, Incorporated of Columbia, South Carolina, is that right, sir?

A The correct corporate title is Thomas & Howard Company, you had it right, Thomas & Howard Company, Incorporated, Columbia, South Carolina.

Q How long have you been president of that company, sir?

A Since January 1957.

Q In what business is that company engaged in?

A Wholesale grocery business.

Q How long have you personally been engaged in the wholesale grocery business?

A 21 years, since 1938.

Q With what company or organization were you prior to the time you became president of the Columbia company?

A With other houses of the Thomas & Howard Company.

Q In what general area?

A In Georgia and North Carolina.

Q What are the principal physical assets that the Columbia Company uses in connection with its wholesale grocery business?

A Warehouses, equipment to operate the warehouses, inventories, cars and trucks.

Q Where does the company have its principal warehouse?

A 1942 Laurel Street, Columbia, South Carolina.

[864] Q Is that where you have your own office?

A Yes, sir.

Q In what geographic area does the Columbia company operate?

A In the City of Columbia and some 25 miles average radius around it.

Q Who are the company's customers in general the general category of customers?

A Retail grocers principally, restaurants, state institutions, hotels.

Q Roughly how many grocers in that area are called on by the company?

A Some 550 to 600.

Q Does that include all the retail grocers in that area?

A That includes all of the independent retail grocers in that area.

Q When you say independent, which ones do you mean to exclude?

A The corporate chains. We do not call on them.

Q Why not?

A They have their own sources of supply.

Q And their own warehouses?

A Their own warehouses.

Q About how often would any particular retail store be called on by one of your salesmen?

A Once a week.

[865] Q That includes the little corner grocers, too?

A Yes, sir.

Q What are the principal items of merchandise that are sold by your company to the retailers in that area?

A Dry groceries.

Q What are some examples of that kind of merchandise?

A Sugar, flour, milk, canned vegetables, fruits, tobaccos, notions, drugs, candies.

Q When you say milk, what kind of milk do you mean?

A Canned evaporated milk.

Q What are the principal brands or kinds of canned evaporated milk that your company sells?

A Pet, Carnation, Borden's Silver Cow.

Q Mr. Timberlake, the Commission's complaint in this case is directed to a period of time between Janu-

ary 1, 1956 and March 31, 1958. Have the statements that you made as to the character of your company's business and customers been equally applicable to that period of time?

A Yes, sir.

Q There has been no substantial change in the nature of your company's business in the regards we have been talking about, since January 1, 1956?

A No, sir.

Q Mr. Timberlake, I show you Commission's Exhibit 2704-B which is an invoice addressed to Thomas & Howard Co., Columbia, [866] South Carolina, dated July 8, 1957. It covers a shipment of Borden's tall and Borden's small. It shows a price of \$6.45. Also the form of the invoice refers to a two percent discount for cash in ten days.

Would you please tell us the price at which your company offered that milk, canned evaporated milk to the retail trade?

A \$6.50 and \$6.55.

Q What was the reason for the two different prices?

A The \$6.50 price was to those customers who qualified for what we call our volume pricing program. The \$6.55 price was for those customers who did not qualify for that program and were sold on the regular price.

Q Was your volume pricing program based upon volume of Borden's Silver Cow or upon total volume of purchases from you?

A Total volume of purchases and other considerations.

Q Now, the particular invoice that I showed you was dated July 8, 1957. Directing yourself to the entire complaint period which I mentioned, that is from January 1, 1956 through March of 1958, will you say whether it was your usual practice to resell the Borden's Silver Cow at the same markup which you have just described?

A Yes, sir.

Q In other words, a markup of five or ten cents per case above the list price which you paid?

[867] A Yes, sir.

Q How did that amount of markup compare with the amount of markup which your company obtained generally on its items of merchandise?

A It was much less.

Q Than the average of your items, shall we say?

A Much less than the average of the items, yes, sir.

Q You have other items which were also handled at low markups?

A Yes, sir.

Q Were your company's customers offered any cash discount off that price that you have just referred to?

A No, sir, those are net prices.

Q You have said that the Borden's Silver Cow, Pet and Carnation evaporated milks were the principal kinds which you carry. Going back to January 1, 1956, did your company carry other kinds of canned evaporated milk?

A Yes, sir. We had the Armour's brand and the Red and White Brand.

Q Was the Red and White Brand offered to all of your retail store customers?

A No, sir, only to the Red and White customers.

Q That is to the retailers who were a part of that Red and White group?

A Yes, sir.

[868] Q What connection, if any, did your company have with the Red and White group of stores?

A We are the franchised wholesale supply house for that territory.

Q As of January 1, 1956, who was packing the Red and White label evaporated milk that you were furnishing to those Red and White stores?

A Westerville Creameries.

Q Did you at that time know where the Westerville manufacturing and packing plant was?

A No, sir.

Q Were you buying that merchandise on a delivered price basis or on an FOB plant basis?

A Delivered price basis.

Q If you know, will you state who owned the Red and White trade names?

A Bushey & Wright, Incorporated, Chicago, Illinois.

Q Who were they?

A They are brokers who handled the Red and White label merchandise.

Q You mentioned that as of January 1, 1956, your company also handled Armour brand evaporated milk. I suppose that was packed by the Armour Company?

A Yes, sir.

Q Do you know who owned that trade name?

[869] A Armour & Company.

Q The record in this proceeding shows that at a point after January 1, 1956, the Thomas & Howard organization was purchasing canned evaporated milk packed by the Borden Company and bearing a Miss Virginia label. Will you tell us when your Columbia company commenced handling that item?

A July 1957.

Q Prior to that time, I take it from what you have already said, your Columbia company was not selling any canned evaporated milk under the Miss Virginia name?

A No, sir.

Q Regardless of who packed it?

A No, sir.

Q Was that Miss Virginia name something you just thought up at that time?

A Sir, it was not.

Q Where did you get the name?

A Miss Virginia label was being used and had been used since 1935 by one of our affiliated houses in Salem, Virginia.

Q What was that house, what was the name of it?

A Virginia Foods, Incorporated, Salem, Virginia.

Q Did you personally hold any office in that company?

A Yes, sir.

Q What office?

A I am a director and vice president.

[870] Q That was true as of 1957, also?

A Yes, sir.

Q You say that the Salem house had used the name "Miss Virginia" since 1935. Do you mean it was used on evaporated milk?

A Yes, sir.

Q Was it used in any other items?

A Yes, sir.

Q I take it then since the Salem house had been using the name Miss Virginia, that your Columbus house did not have to go out and have a plate made up in order to print those labels?

A We did not.

Q Do you know about what such a plate costs?

A About \$250.00, yes, sir.

Q Mr. Timberlake, there are in the various records in this proceeding, data as to the label costs of the Miss Virginia brand. Can you tell us about how many labels of Miss Virginia name are printed up at any one time by the Thomas & Howard organization?

A We order 600,000 at a time.

Q Each time you go to the printer you put in an order for that amount?

A Yes, sir.

Q If you order a smaller amount than that at any given time, [871] would your price be more or less?

A The price would be much more.

Q If we wanted to find out how many cases of 48's that would be involved in 600,000 labels, I guess we just divide it by 48 or so?

A Normally, they figure about 50 labels per case when you are printing them up because there might be some wasted.

Q So if we divide the 600,000 by 50, that is about how many cases of milk that involves?

A Yes, sir.

Q You say that in July 1957, your Columbia house of Thomas & Howard took on the Miss Virginia brand of canned evaporated milk packed by the Borden Company. At what price did you offer that to the retail trade?

A \$5.85 and \$5.95.

Q The two prices depending upon whether the customer was a volume customer or not?

A Yes, sir.

Q Did you offer the customer any discounts, concessions, allowances in connection with that price?

A We paid to customers a 15-cents a case display allowance.

Q You say that was your price in July 1957. Was there any change in that price between then and the end of March 1958?

A No, sir.

Q When you got into the first shipment of the Miss Virginia [872] canned evaporated milk, what did you do by way of instructions to your salesmen in that regard?

A We printed an item in our sales bulletin with reference to Miss Virginia milk, pack, size and description, the selling price, we presented that to our salesmen at a sales meeting held on Friday nights —

Q You say we, were you personally present at that sales meeting?

A Yes, sir. We told them that it was an exclusive labelled milk that was packed for us so that we could offer it to our customers. We explained to them the display allowance and furnished to them samples so that they could show it to the retail trade.

Q Had those samples been furnished by the Borden Company for that purpose?

A No, sir. It came right out of our stock.

Q In other words, you paid full prices to Borden?

A Yes, sir.

Q Anything else you told the salesmen?

A We then again on Monday morning before they went out to the trade discussed the matter again and asked them to present it to the retail customers explaining to them that it was their own label, that it would not be offered by any chain stores, because it was coming through us. And then they went out and began offering it to the grocery trade.

【873】 Q What about the individual salesmen, did they get any specific incentive for pushing that item?

A Yes, sir.

Q What?

A We paid to him a two percent bonus on all that he sold.

Q Of the Miss Virginia?

A Of the Miss Virginia label.

Q Did you tell the salesmen who packed the Miss Virginia label?

A No, sir.

Q Now let's compare that with your arrangements and instructions to your salesmen with respect to Borden's Silver Cow. I think you have already mentioned that there was no display allowance offered in connection with that item?

A No, sir, there was not.

Q Did you give your salesmen any bonus in connection with the Borden's Silver Cow?

A No, sir.

Q Did you require the salesmen to carry samples of Borden's Silver Cow?

A No, sir, we did not.

Q What did you tell the salesmen to do about Borden's Silver Cow?

A We never talked about the sale of milk because of the Borden's Silver Cow milk because of the margin. We just took the orders from the grocery trade.

[874] Q You say you started to sell the Miss Virginia in July 1957. How did it go?

A We started off rather slowly because we had to get customers on it and —

Q What kind of reports did you get back from your salesmen as to the reactions of the trade?

A We had quite a bit of resistance. The retail trade had had experience years ago selling a private label or an exclusive label milk, unadvertised and they had not been successful.

Q Incidentally, you speak of advertising, is the Armour brand an unadvertised brand?

A Yes, sir. I have never seen any advertising on it.

Q But the others you mentioned, Borden's Silver Cow, Pet and Carnation are advertised products?

A Yes, sir.

Q You say the reaction was slow. By the end of March 1958, how were you doing with the Miss Virginia?

A We were selling quite a good bit of it.

Q Well, of those 550 to 600 retail customers, about how many of them were giving you an order now and then for the Miss Virginia?

A The ones buying it regularly were approximately 50.

Q Were there some others buying it occasionally?

A Occasionally, yes, sir.

[875] Q These customers, 50 or so, who were buying the Miss Virginia regularly at the end of March 1958, were they substituting that for the Borden's Silver Cow?

A No, sir.

Q Were they substituting it for the Pet or the Carnation?

A No, sir. We continued to sell just as much of those.

Q Continued to sell just as much of the Borden's Silver Cow, Pet and Carnation?

A Yes, sir.

Q What about your Armour sales?

A Our Armour sales declined to practically nothing.

Q By the end of March 1958?

A Yes, sir.

Q Mr. Timberlake, as of July 1957, when your company took on the Miss Virginia and started to offer it to your retail trade, did your customers include the Power Food Stores, Inc.?

A Yes, sir.

Q I ask you that same question, Mr. Timberlake, with regard to Shumpert Foods and Sales?

A Yes, sir.

Q I also ask you that same question with regard to Frye and Caughman Grocery?

A Yes, sir.

Q All three of those were customers on your regular list and routinely called on by your salesmen in July 1957?

【876】 A Yes, sir.

Q Prior to the end of March 1958, did Shumpert Food Sales buy any of the Miss Virginia from you?

A Yes, sir.

Q In any substantial quantities?

A Yes, sir.

Q Was he your larger customer?

A He was our largest single customer for the Miss Virginia milk.

Q Of the total volume of the Miss Virginia that you sold prior to the end of March 1958, can you tell us about what proportion was sold to Shumpert Food & Sales?

A Right at one-third.

MR. LUKINGBEAL:

Mr. Examiner, we have, I think, generally throughout the proceeding been directing ourselves to the period up to the end of March 1958 and the Respondent considers, of course, that is the appropriate cut-off date. However, in the testimony of one of the Commission's witnesses, there was sort of conjecture advanced by him as to something that had gone on near the end of 1958. Mr. Timberlake is prepared to state the facts on that, and without waiving our position as to the general propriety of the March 31 cut-off, I would like to just get the record straight on that while Mr. Timberlake is here.

By Mr. Lukingbeal:

Q Mr. Timberlake, Mr. Power of Power Food Store testified in this proceeding some time ago. The date of his testimony was in December 1958. At that time, at page 451 of the transcript, he said that a couple of weeks before that time he had commenced to handle another type of evaporated milk which he had bought from Thomas & Howard. A little later in his testimony he mentioned the name of the item as being Miss Virginia and then at page 464, Mr. Power said that he couldn't state the exact price that he paid for the Miss Virginia. He said he thought the price was \$6.25 or \$6.30.

MR. LUKINGBEAL:

May we have this marked for identification?

HEARING EXAMINER LIPSCOMB:

Marked as Respondent's Exhibit No. 6.

(The document referred to was marked Respondent's Exhibit No. 6, for identification.)

[878] By Mr. Lukingbeal:

Q In that connection, Mr. Timberlake, I show you Respondent's Exhibit for identification, 6, and ask you to say what that document is, please?

A That is a receipt to Power Food Stores from Thomas and Howard Company, Columbia, South Carolina dated November 11, 1958.

Q That includes an item, Miss Virginia milk at \$5.97, is that correct?

A That is correct.

Q Incidentally, was that \$5.97 the price before the fifteen cent display allowance that you mentioned earlier?

A Yes, sir.

Q That was your price as of November 11, 1958. I think a little earlier you testified up through March 1958, your price had been \$5.95 and \$5.85?

A Yes, sir.

Q I take it there has been some modest increase in your price?

A Yes, sir.

Q Was there any change in your price between November 1958 and the end of the year '58?

A No, sir.

Q Incidentally, we have been talking about the Columbia House of Thomas and Howard. You have given us the exact [879] corporate name of that house. Does the Thomas and Howard organization include another separate corporation over at Chester, South Carolina?

A Yes, sir.

Q What is the name of that one?

A Thomas and Howard Company, Chester, South Carolina, Incorporated.

Q Did the Columbia House get the Miss Virginia from the Chester House?

A Yes, sir.

Q It was the Chester House that had the purchasing relationship on behalf of the Thomas and Howard organization, is that right?

A Yes, sir.

Q That Miss Virginia label, I take it from what you said, was owned in July 1957 by the Salem House, is that right?

A Yes, sir.

Q Does that continue to be so down through March 1958?

A Yes, sir.

Q Mr. Timberlake, you said that you have been president of the Columbia House since, did you say early '57 or thereabouts. Were you associated with the Columbia House prior to that date?

A Yes, sir.

Q In what capacity?

[880] A I was vice president and had been a vice president of the Columbia House since 1949. I have lived in Columbia since 1955.

Q Mr. Timberlake, you told us about two sales meetings that you had in July 1957 just before sending your salesmen out on the road with the Miss Virginia. You said there was a meeting on a Friday evening and then a meeting on Monday morning and you told us what instructions you gave your salesmen at that point. After that, what did you do by way of following up as to the carrying out of those instructions?

A We checked with the salesmen each night to see how our sales were going, get reports from them of what they ran into on the trade.

Q You say you checked with your salesmen each night, you mean you keep your office open at night there?

A Yes, sir.

Q How late?

A Our manager stays there until about 7:00, 8:00 o'clock every night. Our office stays open until about 1:00 o'clock in the morning.

Q 1:00 o'clock in the morning?

A Yes, sir.

Q What time does your manager get to work?

A The manager doesn't keep the office open all that time. The office is open.

[881] MR. LUKINGBEAL:

You may cross-examine.

MR. HAYS:

Your Honor, may I have fifteen minutes to review certain relevant portions of testimony.

HEARING EXAMINER LIPSCOMB:

Fifteen minutes:

MR. HAYS:

Yes, your Honor.

HEARING EXAMINER LIPSCOMB:

We will recess until 2:00 o'clock.

(A recess was taken.)

HEARING EXAMINER LIPSCOMB:

On the record.

CROSS-EXAMINATION

By Mr. Hays:

Q Mr. Timberlake, there is some confusion in my

own mind about this label situation. I believe that you referred to the printing of approximately 600,000 Miss Virginia labels at one time. Were all those 600,000 labels of Miss Virginia labels for evaporated milk?

A Yes, sir.

Q Only?

A Yes, sir.

Q Now, I believe we have mentioned in the record by you a Thomas and Howard Company, Incorporated of Columbia, South Carolina, Thomas and Howard of Chester, South Carolina, and Affiliated Virginia Company. Were all of those labels for evaporated milk, that is, the Miss Virginia brand, for only your company at Columbia, South Carolina, or were they for as [882] well the company at Chester and the Virginia Company?

A They were for Columbia, Chester and the Virginia Company.

Q Were they for any other companies?

A Yes, sir.

Q And what were the names of those companies?

A There are some 29, if you would like all of those names.

Q In other words, there are 29 other affiliated corporations?

A There are a total of some, I believe it is 28 right now, I think one has been sold. I believe there are 28 total Thomas and Howard affiliated companies.

Q Are the affiliated companies that you have not named, are they engaged in the same type of business that your company at Columbia is engaged in?

A Yes, sir.

Q In other words, they are wholesale grocery business houses?

A Yes, sir.

Q Now, will you then tell us the area of operation of all of those affiliated companies?

MR. LUKINGBEAL:

If I may interrupt, you don't mean each of them, all of them as a group, Thomas and Howard group?

MR. HAYS:

Yes.

A Western Virginia, all of North Carolina, South Carolina, and most all of South Georgia. During this period we are talking about, there was a house in Florida.

[883] Q In those states named, did you cover the state?

A We covered all of Western Virginia, all of North Carolina, all of South Carolina, and as I say, most all of South Georgia.

Q In other words, those affiliates had blanket coverage when they operated?

A Yes, sir.

Q They didn't miss any population centers, is that right?

A No, sir, we did not.

Q When you refer to the fact that you had a plate for the Miss Virginia brand, it was a plate that was common to all of those affiliates, is that correct?

A Yes, sir.

Q A printing plate I am referring to?

A Printing plate is what we are talking about.

Q Do you also have other private labels of your own?

A Yes, sir.

Q Do you also have plates for those labels?

A Yes, sir.

Q Do you have anything to do with those affiliated concerns?

A Some of them.

Q How many do you have anything to do with?

A Twelve others.

Q You are an officer in twelve others?

A Yes, sir. I am an officer in twelve of them all told, not twelve in addition to the ones we have already named.

[884] Q Those I take it would be the South Carolina affiliates?

A Yes, sir.

Q And Georgia affiliates?

A Yes, sir.

Q Let's return now to just the Columbia, South Carolina affiliate and ask you as of March of 1958, in that month, how many cases of Miss Virginia label evaporated milk were sold by the Columbia Thomas and Howard?

MR. LUKINGBEAL:

If he knows?

THE WITNESS:

May I give you an approximate answer?

MR. HAYS:

Yes.

A Approximately 600.

By Mr. Hays:

Q 600 cases in the month?

A Yes, sir.

Q I believe it is your testimony that in that month, Shumbert bought approximately one-third of your total sales of Miss Virginia brand evaporated milk, is that correct?

A Yes, sir.

Q So in that month, that would mean that Mr. Shumpert purchased approximately 200 cases of Miss Virginia label canned evaporated milk?

MR. LUKINGBEAL:

If I may interrupt, I think the record will show, Mr. Hays, the question I asked was the proportion taken by Mr. Shumpert during the period from July of [885] '57 to March of '58. I don't believe I asked the witness a question directly specific to the month of March 1958.

MR. HAYS:

I will accept your word on that.

By Mr. Hays:

Q Did Mr. Shumpert in March of 1958 buy approximately one-third of your total sales of Miss Virginia brand evaporated milk?

A I would think that would be correct.

Q Now to refresh my own recollection, what was the date that Miss Virginia brand evaporated milk was

first offered to your customers?

A Late July, 1957.

[886] Q Did Shumpert purchase canned evaporated milk July 1957?

A I believe our records show that he purchased in August 1957.

Q Now, I believe you stated that when Miss Virginia brand evaporated milk was first offered to your customers, it did not go so good, is that correct?

A That is correct.

Q So in the month of August 1957, approximately how many cases of Miss Virginia brand evaporated milk was sold to your customers by the Thomas Howard of Columbia?

A If I might answer in this fashion, I can tell you how many cases we purchased. There might be some differences in our sales and purchases, but there wouldn't be very much.

Q Approximately how many?

A Approximately 250 cases.

Q Did Mr. Shumpert purchase approximately one-third of that amount in August of 1957?

A No, sir.

Q When did he first start purchasing in that amount?

A Not until November or December of 1957.

Q In the first month that he purchased, did he purchase approximately one-third of your total cases of canned evaporated milk sold?

A In the first month he purchased, that was August, he did not purchase one-third of the sales.

[887] Q But he did purchase something in August?

A Yes, sir.

Q How much?

A Ten cases, I believe.

Q What about September of 1957?

A If any, our records don't show.

Q I take it you have checked the records prior to coming?

A Yes, sir, I looked through his invoice file.

Q Did he purchase anything in November or December of 1957?

A Yes, sir.

Q Approximately what amount?

A In November, approximately 65 cases. In December, maybe 150 to 200 cases.

Q That was — was that approximately one-third of your total sales in that month?

A Yes, sir.

Q From December 1957 to March of 1958, did your monthly sales of Miss Virginia brand evaporated milk run approximately 600 cases per month?

A For the full period that we have been talking about, our total sales were 3,000 cases. And if we were to divide that by the number of months involved, I think we would arrive at the average sales per month.

Q Now, did I understand that you testified that a Power Food Store did not buy any Miss Virginia brand evaporated [888] milk during the entire period that it was offered for sale?

A Are you talking about the period —

MR. LUKINGBEAL:

If I can interrupt, he didn't testify about that. I asked him about the price in November or December of 1958. I showed him an invoice.

MR. HAYS:

I will withdraw that question with the permission of the Examiner.

By Mr. Hays:

Q And ask you, if the Power Foods Store purchased any Miss Virginia brand canned evaporated milk?

A No, sir.

Q My question is directed to the time period July 1957 to March of 1958?

A No, sir.

Q Did Frye & Caughman purchase any Miss Virginia brand canned evaporated milk?

A Yes, sir, during the period we are talking about.

Q During the period of July 1957 to March of 1958?

A Yes, sir.

Q They did?

A Yes, sir.

Q In what amounts, sir?

A I cannot give you the total. The purchases were in units of five to ten cases at the time, but I do not know the total figures.

【889】 Q Did they purchase during this period less than the Shumpert outfit?

A Yes, sir.

Q Approximately how much less?

A Considerably less.

Q Would you say that they purchased less than 50 cases during this whole period?

A During that period, their purchases might total 50 cases.

Q That would be a fair approximation.

Now, during this period, what was the name of the salesman that was calling on a Power Foods Store?

A Mr. Everett Tindall.

Q Is he still with your company?

A Yes, sir.

Q Does he still call on the Shumpert Food Stores or has his territory been changed?

A I didn't say he called on Shumpert Food Stores.

MR. LUKINGBEAL:

The question was directed to Power.

THE WITNESS:

You said Power Food Stores.

MR. HAYS:

Power Food Stores?

THE WITNESS:

His territory has not been changed, he is still calling on Mr. Powers.

By Mr. Hays:

Q I see.

Who called on Shumpert during this period?

[890] A Mr. Hoyt Epting.

Q Is he still with your company?

A Yes, sir.

Q Is he still calling on Shumpert Foods?

A Yes, sir.

Q Who called on Frye & Caughman?

A Mr. Hoyt Epting.

Q Is he still calling on this company?

A Yes, sir.

Q Now, when you first bought from Borden the evaporated milk which was labeled Miss Virginia in July of 1957, what was the price that you paid?

A The price that we paid to Thomas & Howard Company, Chester, South Carolina, who billed it to Columbia, was \$5.21 per case, which included the price of the milk, plus the cost of labels, plus handling charges, 5-cents per case.

Q I take it that Thomas & Howard of Chester purchased it from Borden Company?

A No, sir.

Q Where did they get it?

A They purchased it from Biddle Purchasing Company.

Q What is the Biddle Purchasing Company?

A Biddle Purchasing Company is a company here in New York City that — it is a buying service. They perform a buying service for wholesale groceries.

【891】 Q Do they perform the buying service for your Thomas & Howard outfit?

A Yes, sir.

Q Products other than evaporated milk?

A Yes, sir.

Q How are the transactions covering the purchase of canned milk handled insofar as the Borden Company, the Biddle Purchasing Company and the Thomas & Howard affiliates are concerned?

MR. LUKINGBEAL:

Your Honor, I have been remaining quiet although a great deal of Mr. Hays' questioning is in the present

tense. I take it he really means to be directing himself to the complaint period, January 1, '56 up to March of '58.

MR. HAYS:

Yes, your Honor.

MR. LUKINGBEAL:

And the witness may understand unless you say otherwise, that is what you do mean to ask him?

MR. HAYS:

Very well.

THE WITNESS:

Thomas & Howard Company and affiliated houses place their orders with Biddle Purchasing Company, who places the order in turn with the Borden Company. The Borden Company notifies the plant concerned of the order and then the plant notifies us when it is ready to be picked up.

By Mr. Hays:

Q Do you have any communications with the Borden Company concerning the product?

【392】 A No, sir, I do not.

Q Does anyone in your company?

A The manager at Thomas & Howard Company, Chester, is notified by the plant manager of the Borden plant at Chester when the milk is ready.

Q And do you take any part in the negotiations of price of the milk?

A No, sir.

Q In other words, do you know what the price of the milk will be?

A We are advised by a monthly bulletin from the Biddle Purchasing Company what our price will be for the coming month.

Q When did you first start dealing with the Biddle Purchasing Company with reference to purchases of canned evaporated milk?

A A short time prior to July 1957.

Q Now, when you pay for the milk that you purchase, who is the payee on the check?

A The payee is Biddle Purchasing Company.

Q You pay Biddle, is that correct?

A Yes, sir.

Q And the check physically goes to Biddle, is that true?

A Yes, sir.

MR. LUKINGBEAL:

Do you mind if I might interrupt, [893] since there has been testimony that there is the Columbia house of Thomas & Howard, which got this Miss Virginia milk from the Chester house from Thomas & Howard which in turn got it from Biddle, I would suggest the question placed, "What did you" may raise a little bit of confusion.

THE WITNESS:

Mr. Lukingbeal, I was assuming he was talking to me as both Columbia and Chester, if that is fair enough.

MR. LUKINGBEAL:

I think your answers have indicated that. I just suggest to avoid confusion, if you can be specific so we know which house we are talking about.

MR. HAYS:

I take it that the Thomas & Howard at Chester, South Carolina, sends an invoice to you, is that correct?

THE WITNESS:

Yes, sir, they send it to our Columbia office.

By Mr. Hays:

Q And your Columbia office sends the check direct to Biddle, is that right?

A No, sir, we remit to Thomas & Howard Company, Chester. Thomas & Howard Company Chester in turn remits to Biddle Purchasing Company.

Q Now on the check that you send to Thomas & Howard in Chester, is the payee the Biddle Purchasing Company?

A The payee is Thomas & Howard Company.

[894] Q And Thomas & Howard Company of Chester, South Carolina, then, I take it, sends a check to the Biddle Purchasing Company?

A Yes, sir.

Q And the payee on that check is Biddle Purchasing Company?

A Yes, sir.

Q What are the terms of the relationship, contractual relationships between Biddle Purchasing

Company and Thomas & Howard Company of Columbia, South Carolina, and of Chester, South Carolina?

MR. LUKINGBEAL:

Your Honor, I think that is a double question. I think the witness' testimony should make it clear that insofar as he has been asked, there is no relationship between Thomas & Howard of Columbia and Biddle Purchasing Company. He has said that the purchase prices with respect to the Miss Virginia were paid by the Columbia house of Thomas & Howard to Chester house of Thomas & Howard which in turn had the relationship with Biddle. I don't object to his asking both questions, but I think they ought to be split into two parts.

MR. HAYS:

I have no objection to splitting it into two questions.

By Mr. Hays:

Q What are the terms of the relationship between Thomas & Howard of Columbia, South Carolina, and the Biddle Company?

A Is your question related to the purchase of Miss Virginia [895] milk?

Q Yes.

A Thomas & Howard Company, Columbia, South Carolina, has no contractual relations with the Biddle Company for the purchase of Miss Virginia milk.

Q Thomas & Howard of Columbia does not pay Biddle anything for any services it may perform or did perform?

A Yes, sir.

Q It did pay Biddle?

A Yes, sir.

Q Paid direct?

A Direct to Biddle?

Q Yes, sir. How much did it pay Biddle?

A \$50,00 monthly.

Q Is that all?

A That is all Thomas & Howard Columbia pays Biddle.

Q Now, what are the terms of the relationship between Thomas & Howard of Chester, South Carolina and Biddle Company?

A They also pay a fee for being a member of the Biddle service.

Q What is that fee, sir?

A \$25 per month.

Q Why do they pay less?

A Columbia holds the master agreement and all affiliated houses on a subsidiary agreement, I guess you call it, and pays the \$25.00.

[896] Q Is there a master agreement? In addition is there some other kind of agreement?

A No, sir. Only one contract.

Q Does t h a t contract cover specific products or cover all products?

A All products.

* * * *

[905] Q With reference to Miss Virginia label, I believe you stated that the salesmen were offered a bonus of some kind, is that correct?

A Yes, sir.

Q That bonus was what, sir?

A Two percent.

Q Two percent of what?

A Of their sales.

Q Two percent of their sales. Did you pay that two percent to them?

A Yes, sir. When you say "you," you mean the Company?

[906] Q Yes.

A Yes, sir.

Q Did the company receive reimbursement from anyone else on that two percent?

A No, sir.

Q During this period you stated that the markup on Borden brand, Silver Cow, that you obtained was much less than the average of the markup of your other items sold, is that correct?

A Yes, sir.

Q How did this compare with the markup on Miss Virginia brand?

A The markup on the Miss Virginia brand was greater.

Q It was greater than the Borden brand?

A Yes, sir.

Q I may be incorrect, but I don't believe you stated just what you paid per case for Miss Virginia brand?

A \$5.21.

Q That \$5.21 was prevalent at all times during the period January 1956 to March 1958?

A No, sir.

Q When was it prevalent?

A It fluctuated during the period we purchased. We didn't begin purchasing in January 1956.

Q I believe you started in March of '57 or July of '57?

A July '57. That was the price it cost in July '57 and it fluctuated, both up and down.

[907] Q Do you recall your testimony concerning a 15 cent a case display allowance which was granted to your customers for Miss Virginia brand?

A Yes, sir.

Q What were the terms of that offer to your customers? What were the full terms of the offer?

A Minimum purchase and display of minimum of five cases. The salesmen were authorized then to pay in cash to the customers 15 cents for each case displayed.

Q In other words, they had to buy five cases and display five cases?

A Yes.

Q As a practical matter during the period of July 1957 through March 1958, when you purchase Miss Virginia brand, I take it it was shipped out of Chester, South Carolina, is that correct?

A Yes, sir.

Q Was it then shipped into your warehouse or was it shipped direct to the customers?

A Shipped into our warehouse.

Q Is it correct that during the period January 1956 to March 1958, the salesmen of Thomas & Howard at Columbia didn't try to sell Borden brand milk to their customers?

A That is correct.

Q Did not try to sell it?

[908] A Yes.

Q Did they try to sell other Borden brand products?

A Yes, sir, and when we say "Borden brand, we are talking about Borden brand evaporated milk.

Q Borden Silver Cow?

A Yes, sir.

Q Why did you carry it?

A As a service to our customers.

Q They wanted the Silver Cow brand?

A Yes, sir.

Q Did you also carry it as an accommodation to Borden?

A No, sir.

Q You did not ?

A No, sir.

Q Isn't it of some value to you as a wholesaler to handle an advertised product?

A Yes, sir; if the customers want it, we want to have it for them so that we can supply them as nearly 100 per cent of their requirements as we can.

Q In your testimony concerning Silver Cow brand, you gave two prices: \$6.50 per case and \$6.55 per case, and you stated that the \$6.50 price was applicable where they were in a volume pricing program, I believe. What was that volume pricing program you referred to?

A Customers who purchased a minimum of \$250 total purchases **[909]** weekly and who paid for those purchases within a seven-day period, qualified for our volume pricing program.

Q What is your average markup percentagewise covering all items during this period?

A Seven percent.

Q Did you handle Red and White brand evaporated milk?

A Yes, sir, we handle it.

Q During what time?

A During this period, January 1956 through March 1958.

Q Did you sell Miss Virginia brand to any Red and White stores during this period?

A We may have.

Q Ordinarily, Red and White stores would carry their own Red and White brand of evaporated milk to the exclusion of your Miss Virginia brand?

A That is correct.

HEARING EXAMINER LIPSCOMB:

We will have a five minute recess.

(A recess was taken.)

[910] HEARING EXAMINER LIPSCOMB:

On the record.

By Mr. Hays:

Q Mr. Timberlake, what was the situation during the period January 1956 through March of 1958 with reference to your handling of evaporated milk under Red and White label?

A When we first started handling the Red and White Milk, which was shortly before the period in question, we were purchasing it from Westerville Creameries and during this period, shortly after July 1957, we changed and began purchasing it through Biddle Purchasing Company.

Q Immediately prior to July of 1957, what price were you paying for Red and White label evaporated milk?

MR. LUKINGBEAL:

May I have that question back, please?
(The reporter read the question.)

THE WITNESS:

I believe the cost was \$5.85.

By Mr. Hays:

Q What were you selling it to Red and White for, the stores?

A \$5.90 or it might have been \$5.95.

Q Did you negotiate with Westerville Creamery as to price directly less?

A No, sir.

Q Do you know who did that negotiating?

A We made our purchases from Bushey & Wright. I would imagine Bushey & Wright did the negotiating.

[911] Q Bushey & Wright I believe you referred to as the Biddle Purchasing Company or individuals in that company?

A No, sir, Bushey & Wright is a brokerage Company in Chicago.

Q Is it connected with Biddle Purchasing Company?

A No, sir.

Q How did it happen that you stopped purchasing Red and White label canned evaporated milk that came from the Westerville Creamery?

A The Biddle Purchasing Company put out in its regular bulletin a statement concerning the offering of evaporated milk. One of our locations checked with them to see what it would cost us and we were given then the cost. We requested permission from Bushey & Wright to permit us to purchase the Red and White milk from the Chester Borden plant.

Q Who did you talk to at Bushey & Wright?

A Mr. Leo J. Bushey.

Q Did you have that conversation with him personally?

A No, sir.

Q Some one in your company did?

A Yes, sir.

Q Who was that?

A Mr. L. B. Williams, Sr.

Q What do you mean by one of your locations?

A I think it has been brought out that there are several [912] of the Thomas & Howard Companies.

Q You refer then to one of your affiliated corporations?

A Yes, sir.

Q Which corporation was that?

A Thomas & Howard Company in Salisbury, North Carolina.

Q Are you an officer in that Corporation?

A No, sir.

Q What was the price of that milk?

A \$5.04 per case plus labels, plus freight.

Q Now, the \$5.85 or \$5.90 on the milk coming from the Westerville Creamery was what, a delivered price?

A Yes, sir.

Q In other words, freight and labels were included?

A Yes, sir.

Q Was there any cost advantage in the \$5.04 figure plus freight and labels as compared to the \$5.85 figure?

A Yes, sir.

A We figured that the cost, including labels and freight, to Columbia was \$5.21. So, it would be that difference between \$5.21 and \$5.85, which we assumed to be a difference in freight. They shipped out of Ohio and we were there in South Carolina.

Q What plant did the Miss Virginia milk come from, what location?

[913] A Chester, South Carolina.

Q From what location and at the same time did the Borden brand evaporated milk come from that you purchased?

A Chester, South Carolina, but not always from Chester. It came from various plants.

Q Some of it came from Chester?

A Some came from Chester.

Q Quite a bit of it?

A I would imagine so.

[914] Q At this time you were paying \$6.45 per case for Silver Cow milk; is that right?

A Yes, sir.

MR. LUKINGBEAL:

What is "this time"?

MR. HAYS:

At the time he was paying \$5.04 plus labels and freight on private label evaporated milk.

By Mr. Hays:

Q Is that right, sir?

A We are talking about July of 1957 I believe?

Q Yes, sir.

A Yes.

Q During the period of January 1, 1956 to March of 1958, what has been the sale trend with reference to Armour evaporated milk?

A In our case it declined to almost nothing and we have discontinued it.

Q Did you handle Pet —

A Yes, sir.

Q — canned evaporated milk during this period?

A Yes, sir.

Q What has been the situation with reference to the sales trend during the same period on Pet brand evaporated milk?

A It has probably been upward. We are selling just as much Pet as ever.

Q What has been the trend with reference to Carnation?

[915] A It has been that same experience.

A Upward.

Q Upward?

A Upward.

Q What has been the trend with reference to the Borden brand?

A It has been the same; no decline.

Q Did you sell any other canned evaporated milk during that period — other brand?

A No, sir.

Q What has been the trend with reference to Red and White Label?

MR. LUKINGBEAL:

During that same period?

THE WITNESS:

During that same period?

By Mr. Hays:

Q Yes, sir.

A It remained the same, probably more as time went on.

Q In the sales areas of Thomas and Howard in Columbia, South Carolina, isn't it true that the sale of non-advertised products has increased during the past five years?

MR. LUKINGBEAL:

Just a minute. If the question is intended to encompass anything beyond canned evaporated milk, I object to it as being irrelevant and beyond the scope of the direct.

MR. HAYS:

I submit, your Honor, that it is not beyond the scope of the direct for the reason that the witness [916] stated that when he first took on this private label Miss Virginia milk there was some resistance to that

on the part of his customers for the reason that at some time in the past they had had unfortunate experiences with —

MR. LUKINGBEAL:

With private label evaporated milk.

MR. HAYS:

— private label evaporated milk. Now, your Honor, I submit that this question with reference to private label is one which includes — that is, the evaporated milk situation is a part of the whole private label situation and as such I submit that the question is proper.

HEARING EXAMINER LIPSCOMB:

I think it is proper. Objection overruled.

THE WITNESS:

May I have the question repeated?

(The reporter read as follows:

“In the sales areas of Thomas and Howard in Columbia, South Carolina, isn't it true that the sale of non-advertised products has increased during the past five years?”)

MR. LUKINGBEAL:

May I inquire whether the question goes to any date later than March 31, 1958.

MR. HAYS:

I believe I have already answered that in the affirmative by virtue of his statement going back prior

to the complaint period, and I believe the Examiner has already ruled on that.

[917] MR. LUKINGBEAL:

I must object to the question insofar as it may be intended to go to any date later than March 31, 1958.

HEARING EXAMINER LIPSCOMB:

Objection overruled.

Answer the question.

THE WITNESS:

Yes, sir.

By Mr. Hays:

Q Do you have an opinion as to what the reason for that is?

A No, sir.

Q Will you tell us again just how long you have been in the wholesale grocery business?

A Since 1938.

Q Mr. Timberlake, when you first took on this Miss Virginia brand, why didn't you tell the salesmen who packed it or what concern packed it?

A It was not of any important significance as to who packed it. We were selling the milk on its own merits.

Q The milk was merit-wise the same as Borden evaporated milk, wasn't it?

A I suppose so.

Q And you sold a lot of Borden brand evaporated milk, did you not at that time?

A A fair amount, yes, sir.

Q The Borden label had acceptance, did it not?

A Yes, sir.

1918] Q In your opinion do you think if you advised your salesmen that the Borden Company packed Miss Virginia brand it would help the sales of that brand, what is, Miss Virginia?

MR. LUKINGBEAL:

I object; that is a hypothetical question, your Honor. He said what he did. He stated why he did it. Counsel is now getting him to try to say what would have happened if he had done something else that he didn't do.

HEARING EXAMINER LIPSCOMB:

I should think he had a right to express his opinion if he knew the situation.

You may answer the question.

THE WITNESS:

It might have helped us sell more.

By Mr. Hays:

Q Obviously, you wanted to sell more because you offered a two percent bonus, didn't you?

A Yes, sir.

Q Did you advertise the Miss Virginia brand during this period of July 1, 1957 to March 1958?

A Not to my knowledge. It was advertised by the retail grocers.

Q Did you see those advertisements?

A Yes, sir.

Q Did you have any promotion connected with that selling, those advertisements?

A No, sir.

Q Did any of those advertisements make reference to the [919] fact that the Miss Virginia brand was the same as the Silver Cow brand?

A No, sir.

Q With reference to the time in July of 1957 when your salesmen first started attempting to sell Miss Virginia brand, who in Thomas and Howard of Columbia checked with the salesmen to see how they were doing with reference to the sales of Miss Virginia brand evaporated milk?

A I did, and Mr. E. L. Riley, who has subsequently become manager of Thomas and Howard Company in Columbia.

Q Did you check daily with each salesman?

A Yes, sir.

Q Who were those salesmen that you checked with? How many do you have?

A We have seven.

Q What are their names?

A It would be difficult to give you their names completely during that whole period, but I will try.

Q Pick the months of July and August of 1957.

A Mr. Bob Smith, Mr. Everett Tindall, Mr. Hoyt Epting, Mr. Carl Raines, Mr. Thomas Lever, Mr. Charlie Floyd—is that seven?

Q Yes, sir, it is. No, I have six: Smith, Tindall, Epting, Raines, Lever, and Floyd.

A I believe the total is six rather than seven.

[920] Q And you checked daily?

A Yes, sir.

Q Before or after they attempted to make daily sales?

A The evening, when they checked in.

Q What was the customary time of their checking in?

A In the vicinity of 6:00 o'clock.

Q What was the customary time of their leaving?

A 7:00 o'clock in the morning.

Q Did you check with reference to the sales of other products?

A Any other items that happened to be being pushed at that particular time.

Q Were there other such items?

A Yes, sir.

Q What were they?

A During that period, many different items.

Q Did you check specifically with each item?

A No, sir.

Q Did you check specifically with evaporated milk?

A Miss Virginia evaporated milk.

Q You did?

A Yes, sir.

Q Why?

A Because we were anxious to establish it in the market.

Q At what time did you customarily leave the office during [921] that period?

A Around 7:00 p. m.

MR. HAYS:

I think that is all I have, your Honor.

MR. LUKINGBEAL:

Could I have just a few moments?

HEARING EXAMINER LIPSCOMB:

We will have a five minute recess.

(A short recess was taken.)

HEARING EXAMINER LIPSCOMB:

On the record.

REDIRECT EXAMINATION

By Mr. Lukingbeal:

Q Mr. Timberlake, during the cross examination, reference was made to a master contract or agreement between Thomas and Howard and Biddle. Is that a written document or is it an oral agreement?

A To my knowledge it is an oral agreement.

Q You know of no written document in that regard?

A No, sir, I do not.

Q Who on behalf of the Thomas and Howard organization participated in making that agreement with Biddle?

A I did, sir.

Q Anybody else?

A Yes, sir.

Q Who?

A Mr. C. H. Wentz, at Thomas and Howard Company, Salisbury, North Carolina.

[922] Q What does the agreement provide?

A The agreement provides that on the payment of \$50 by one Thomas and Howard Company, the others would then be permitted to join the Biddle Purchasing Company for a fee of \$25 monthly.

Q What do the companies of the Thomas and How-

ard organization get out of joining the Biddle organization as you have just mentioned?

A Sales bulletins and information concerning market conditions; prices on all grocery commodities.

Q When you say sales bulletins, are you referring to the same thing that you mentioned earlier today as a Biddle document from which you learned about some different private label evaporated milk being available?

A Yes, sir.

Q It was by virtue of Thomas and Howard having—to use your own words—joined the Biddle arrangement that the availability of the Borden packaged private label evaporated milk came to your attention?

A Yes, sir.

Q Still talking about this agreement, which so far as you know is oral, what provisions, if any, does it contain about the prices to be paid by Thomas and Howard to Biddle?

A Oftentimes the publications or bulletins that we receive have prices in them quoting us on prices of merchandise that [923] we might be interested in buying.

Q So far as the master agreement that you and Mr. Hays were talking about, does that have some pricing formula in it?

A No, sir.

Q You referred to a price of \$5.21 paid by the Columbia house of Thomas and Howard to the Chester house of Thomas and Howard for Miss Virginia evaporated milk in July of 1957.

Do you know what price per case was paid for that milk by the Chester house of Thomas and Howard to Biddle?

A I believe the price was \$5.04 per case.

Q Do you know what price was paid by Biddle to the Borden Company for that same milk?

A No, sir.

Q Did you ever know?

A No, sir.

Q Do you have any record to show it?

A No, sir.

Q Mr. Hays referred—rather you in responding to Mr. Hays' questions referred to something like 28 or 29 Thomas and Howard houses or affiliates. During the complaint period, January 1, '56 through March 1958, were all of those affiliates handling the Miss Virginia evaporated milk?

A No, sir.

Q Taking the period when the Columbia house was selling at July 1957 through March 1958, have you any idea roughly [924] what proportion of the other Thomas and Howard affiliates were also handling the Borden packed Miss Virginia evaporated milk?

A About half of them were.

* * * *

[927] MR. LUKINGBEAL:

Mr. Examiner, I understand that Mr. Hays is willing to stipulate the only point I was about to try to make with reference to Respondent's Exhibit No. 8 for identification. The point is that the documents already in evidence or produced by one of the witnesses

called by the Commission indicate that the price paid by Thomas and Howard to Westerville for the Red and White evaporated milk as of May 11, 1957 was \$5.80 per case. The records further show that that purchase in May 1957 at a price of \$5.80 was the purchase most recently prior to the July 1957 date when the Thomas and Howard people commenced to purchase milk packed by the Borden Company.

MR. HAYS:

I agree.

* * * *

[928] Q Referring to the 15 cent per case display allowance that you testified was offered to the retail trade in connection with the Miss Virginia evaporated milk, can you give us any idea what proportion of the retail customers of Thomas and Howard's Columbia house up through March 1958 actually got that [929] allowance?

A Some 50.

Q You mentioned in your direct testimony, if Mr. Hays will allow me to go back that far, I believe that by the end of March you had some 50 regular purchasers of Miss Virginia and then some others who bought more irregularly.

Are you saying that all or substantially all who were regular purchasers of Miss Virginia in fact got the display allowance?

A Yes, sir.

Q Referring now to the circumstances under which Thomas and Howard in the summer of 1957 ceased to

handle Red and White Label evaporated milk packed by Westerville and commenced handling Red and White evaporated milk packed by the Borden Company, did you make any inquiry in that connection as to the raw milk costs incurred by Westerville in connection with the production of Red and White milk?

A No, sir.

Q Did you make any inquiry as to the plant operating costs of Westerville?

A No, sir.

Q Did you make any inquiry as to where Westerville's plant was?

A No, sir.

Q Did you know at that time?

[930] A No, sir, I did not.

Q Did you make any inquiry as to whether Westerville had to pay Bush & Wright anything with respect to the use of that brand name Red and White?

A No, sir.

Q I believe you testified that you were purchasing from Westerville on a delivered price basis; is that right?

A Yes, sir.

Q And you knew if you bought it from Biddle and picked it up at Borden's Chester, South Carolina plant on an f.o.b. plant basis you were going to have to pay the f.o.b. plant price plus the freight from Chester to Columbia; is that right, sir?

A Yes, sir.

Q Is it right to say that all you inquired about was the comparative costs of the two items at your doorstep?

A Yes, sir.

Q And the Borden was cheaper?

A Yes, sir.

Q Incidentally, do you know where that Armour brand evaporated milk was packed?

A I think it is their Wisconsin plant.

Q You were buying that on delivered price basis?

A Yes, sir.

Q You never had any occasion to inquire as to where they [913] packed it?

A No, sir.

Q Or how much their costs were?

A No, sir.

Q Or how much their freight was?

A No, sir.

Q All you knew it cost you so much at your doorstep?

A That's correct.

Q Mr. Timberlake, you told how you came to take on the Miss Virginia evaporated milk packed by the Borden Company, and you referred to the bulletin received from the Biddle Company. Did any representative of the Borden Company at any time prior to July 1957 offer you private label evaporated milk?

A No, sir.

MR. LUKINGBEAL:

That's all, your Honor.

* * * *

RECROSS EXAMINATION

By Mr. Hays:

* * * *

[932] Q With reference to this oral master agreement with the **[933]** Biddle Purchasing Company, how did you happen to call it a master agreement?

A I referred to it as that inasmuch as it was effective for all of our Thomas and Howard companies.

Q It is only an oral agreement?

A To my knowledge, yes, sir.

Q When was that oral agreement made?

A The basis under which we are presently operating, as I have stated, the arrangements were completed the first of January—the first of 1958.

Q It was made in January 1958?

A I believe that's correct.

* * * *

Q Did you have some previous agreement with the Biddle Purchasing Company prior to January of 1958?

A Yes, sir.

Q And was that also an oral agreement?

A As far as I know, it was.

* * * *

[934] Q How long have you been operating under that oral agreement?

A Some ten years.

* * * *

Q What were the terms of the oral agreement of January 1958?

A Thomas and Howard Company, Columbia, South Carolina would pay to Biddle Purchasing Company the fee—the membership fee of \$50 monthly, and all other Thomas and Howard Companies [935] and affiliated houses who desired to display and be members were then billed on the basis of \$25 monthly.

Q Are those the full terms of the oral agreement?

A Yes, sir.

Q What would you receive for your money?

A As I have stated before, we would receive information concerning markets, bulletins, and the privilege of making purchases from the Biddle Purchasing Company.

Q Was it a privilege to make purchases through that company?

A Yes, sir.

Q Why?

A They would not permit anyone to purchase from them other than their members.

Q Any other privilege?

A They would not furnish their information to anyone other than their members.

Q Were there any other members in your area?

A Yes, sir.

Q Were there any other advantages?

A No, sir.

Q Did you find that the prices quoted by Biddle for evaporated milk were lower than the prices for which you could purchase it?

A Yes, sir.

* * * *

Whereupon,

JAMES RALPH BLACKWELL
was called as a witness, and after being properly and
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

Q Will you state your full name, please, sir?

A James Ralph Blackwell.

Q Your residence address?

A 168 West Park Drive, Spartanburg, South Carolina.

Q Are you associated with any business organization at Spartanburg, South Carolina?

A Yes, sir.

Q What?

A Thomas and Howard Company, Spartanburg.

【942】 Q Is the corporation name Thomas and Howard of Spartanburg?

A I believe it is Thomas and Howard Company, Spartanburg.

Q Are you an officer in that company?

A Yes, sir.

Q What office do you hold?

A Secretary and treasurer and also manager.

Q Who is the president of that company?

A T. H. Timberlake.

Q Mr. Timberlake, who is up here with you, sir, is your superior in that company, is that right, sir?

A Yes, sir.

Q What business is your company engaged in?

A The wholesale distribution of groceries and miscellaneous items; considered mostly dry groceries.

Q During the period between January 1, 1956 and March 31, 1958, did you company handle Borden's Silver Cow evaporated milk?

A Yes, sir.

Q Did it also handle Pet and Carnation evaporated milk?

A Yes, sir.

Q Did it also during that period commence to handle an evaporated milk called Miss Virginia?

A Yes, sir.

Q When did it start doing that?

A July 1957.

[943] Q And at what price did your company offer Miss Virginia evaporated milk to the retail trade?

A \$5.95 a case, less a \$0.15 display allowance.

Q Less a \$0.15 a case display allowance?

A Yes, sir.

Q What did the retailers have to do to get that?

A When we originally started off trying to introduce this milk the single was \$5.95 and five-case lots were \$5.95 less \$0.15, but after a few days we reduced the price to \$5.95 on single lot cases less \$0.15 a case.

Q Now, when you say reduced the price to \$5.95—

A We made it available to anybody in one case quantities.

Q After a few days the fellow who bought one case got it at a net price of \$5.80?

A That's right.

Q Did you change that arrangement at any time prior to March 31, 1958?

A No, sir.

Q In what geographic area does your company operate?

A Piedmont section of South Carolina.

Q What towns are involved there?

A We operate out of Spartanburg, probably a 25-mile radius. We go over in the Greenville area and we reach out a little further. We work Tryon, North Carolina, Union, South Carolina, Woodruff and Greenville, South Carolina, and Anderson, Walhalla, [944] Seneca.

Q Do you call on all of the independent retailers in that area?

A We call on all of them that will allow our salesmen to call on them, sir.

Q Are there some independents who won't?

A Yes, sir, there are some independents that have asked our men not to call on them.

Q Why won't they let you in?

A Sir?

Q Why won't they let your salesmen in?

A They belong to a co-op which operates out of Greenville and they are very loyal to their co-op.

Q When you first took on the Miss Virginia brand of evaporated milk and you set your price of \$5.95 plus the \$0.15 display allowance that you have described, what instructions did you give your sales force about the Miss Virginia?

A We had a sales meeting on Friday evening after the men came from their regular day's work and we cut some samples and showed them the quality, gave them some samples to carry home and try over the weekend and we asked them to go out and make an all out effort to try to secure distribution at the retail

level on this new brand of milk, as it was a brand that was controlled by our company and we would very much like [945] to promote the sale of this milk. We felt it would be good for the retailers in our area to have a brand that they would control because we sell only independent retailers, and it would be something that they could build some future business on.

Q Did you tell your salesmen that Miss Virginia was packed by the Borden Company?

A No, sir.

Q Why not?

A Frankly, when we first took it on I didn't know. When we first agreed to take it on I didn't know who was packing it myself.

Q How did the sales go?

A They were very disappointing in our particular house. We had very poor results, had an awfully hard time getting initial distribution.

Q Up until the end of March 1958 how was it going?

A Through March 1958 we had purchased 550 cases and had sold 450 cases; a 100 case inventory at the end of March.

Q Do you know how much of that 450 cases the retailers had on their shelves at the end of March?

A No, sir, I have no idea.

Q Do you know how much your Thomas and Howard house paid for the Miss Virginia evaporated milk?

A I don't remember what we were paying at that particular [946] time. I think it was in the neighborhood, including all the charges, or around maybe \$5.20, \$5.40, but I am not sure.

Q In any event you had some markup on it?

A We had some profit on it, yes, sir.

Q Would you say that 550 cases that you bought from—I guess you didn't say Biddle Purchasing Company—550 cases of Borden packed evaporated milk of which you had sold 450 cases by the end of March 1958, would you say that that was a profitable business?

A No, sir. We couldn't say that we had made any money on it during that period because we had very poor inventory turnover and the amount of sales effort that our men had put forth on it could have been spent much more profitably trying to sell something else. The investment, floor space—if we don't turn something over in 30 days we figure it is costing us money to carry it on the floor then.

Q As of July 1957 how often did your salesmen call on each of your retail customers?

A Each week, and in some cases, some accounts are called on twice a week.

Q What did you do to satisfy yourself as to whether your salesmen were following out your instructions with respect to the Miss Virginia?

A We have a weekly sales meeting each Friday night which is attended by all of our salesmen and myself, and we discuss [947] these products that we particularly want to put some push on and try to come up with ideas of what we can do to do a better job on them or why we are doing such a lousy job on a particular item we want to sell. We talked about Miss Virginia milk quite a lot during the first year of our handling this new brand. Also, I see our salesmen each morning at 7:00 o'clock for five or ten minutes when they are checking in on their day-before sales. I am available if they have any problems.

Q Did you satisfy yourself that your salesmen were calling on each of your customers and offering them Miss Virginia?

A Yes, sir, I did. The men we had had been with us for a long time, and I feel sure they were offering it to the merchants, but due to some other circumstances they were having a hard time getting them to take it on.

Q What other circumstances?

A A large majority of our stores are fairly small accounts and they have a limited amount of shelf space. Also, there was another brand of milk being sold in our territory—in fact, we had sold some of it—at about the same price. It was just a slow process of getting out and giving us shelf space for another brand of milk.

Q During the period from July 1957 through March 1958, what happened with respect to your company's sales of Borden Silver Cow?

[948] A They remained normal.

Q No particular change?

A No, sir.

Q Compared to the preceding period?

A No, sir.

Q How about Pet?

A The same story. We had no change on any of our advertised brands of milk—Pet, Carnation, Silver Cow. They remained stable.

Q Now as of July 1957 when you started to handle the Borden packed Miss Virginia evaporated milk, did your retail customers include one called the Pantry run by Mr. John C. Cromer?

A Yes, sir.

Q I believe he also had some organization called Allied Food Distributors. Do you know anything about that?

A Mr. Cromer and I believe about six other retailers there had formed what they called a co-op, and I believe he was the head of this organization, and they had a little warehouse there and one truck and a driver, and they would try to do some group buying to perform some economies in their buying program.

Q Did your salesmen call on each individual store?

A Each one of them, yes, sir. And we sold them merchandise each week.

[1949] Q You didn't just call on Mr. Cromer on behalf of that group?

A Mr. Cromer just bought on behalf of his particular store when our salesmen called on him.

Q As of July 1957 did your retail customers include the Charles Market, run by Mr. A. P. Charles?

A Yes, sir.

Q I ask you that same question as of that same date with regard to Southern Shop Market and Croft Market, both run by Mr. Henry Grady Coleman.

A Yes, sir.

Q During that period between July 1957 and the end of March 1958, was your company handling Armour brand evaporated milk?

A Yes, sir.

Q What happened to your sales?

A Our sales began to slow up on that brand of milk. We finally eliminated carrying that brand altogether. We do not carry it now. Sometime back.

Q The customers of yours who did buy some Miss Virginia evaporated milk during that period, did they substitute orders for orders of one of the advertised brands?

A No, sir.

MR. LUKINGBEAL:
You may cross-examine.

[950] CROSS EXAMINATION

By Mr. Hays:

Q What's the name of the salesman that called on Cromer?

A Keesler. R. E. Keesler.

Q Do you know whether or not he actually tried to sell Miss Virginia there?

A Yes, sir.

Q Do you know that?

A Yes, sir.

Q How do you know it?

A Mr. Cromer told me so himself.

Q He told you?

A Yes, sir.

Q When?

A Recently.

Q What did he say about it?

A He said that he had been offered—Mr. Keesler had offered him the milk from time to time; in fact, he is carrying it now in stock.

Q Who called on Charles Market?

A C. W. Lowe.

Q Do you know whether or not he offered Miss Virginia private label milk to Charles Market?

A Charles Market, I beg your pardon. I was thinking about Coleman. Charles Market is worked by R. E. Keesler also. He [951] has the two stores and he calls on both of them.

C. W. Lowe calls on the Southern Shop Grocery, also known as Coleman's Supermarket.

Q Do you know that your salesman who calls on Charles Market offered Miss Virginia evaporated milk to Charles Market?

A Yes, sir. Mr. Keesler told me he had offered it to every one of his customers.

Q Mr. Keesler. The basis of your statement is what Mr. Keesler told you; is that right?

A Yes, sir.

Q You weren't there?

A No, sir. Mr. Keesler has been with us a number of years and has a very good sales record and I see him every day. I haven't had occasion to doubt his word.

MR. HAYS:

I move to strike that as not responsive.

HEARING EXAMINER LIPSCOMB:

It will be stricken.

By Mr. Hays:

Q Who is the salesman that calls on Southern Shop Market?

A C. W. Lowe.

Q Were you present when he offered, if he did, Miss Virginia brand evaporated milk to Southern Shop Market?

A No, sir.

Q Your opinion as to whether he offered it, was that on his own statement?

A Mr. Coleman told me they had offered the milk but he [952] didn't see fit to put it on.

Q Did Mr. Coleman say when he was first offered his milk?

A No, sir.

Q When did he talk to you and tell you that?

A I called him up one day last week and asked him.

Q When did you first learn that Miss Virginia brand evaporated milk was packed by the Borden Company?

A When our truck went to make the pickup at the Borden plant in Chester.

Q When was that? The first time.

A I really—we haul part of our milk and sometimes the Chester truck brings it to us; so, I really don't remember whether it was on the first load or after that.

Q Shortly after July 1957?

A I would say sometime shortly after that.

Q Was that the same period that your salesmen were attempting to make an all out sales effort on Miss Virginia brand?

A Yes, sir.

Q Did you tell your salesmen after you learned that Miss Virginia brand evaporated milk was packed by the Borden Company to tell their customers that?

A No, sir, I did not.

Q Why not?

A Well, sir, there was no reason for me to tell them, to [953] use that as a sales argument, that it was packed by Borden.

Q Don't you think that would have helped them sell more of it?

A I don't think so. These retailers—you have a hard time to make them believe you about anything. We were selling them on the merits that it was our own brand and their own brand. When they bought it nobody could buy it except for customers we called on and we called only on independent food retailers that own their own business. We do not do any business with corporate chains.

Q So, as a matter of fact, it didn't make any difference where the milk came from?

A That's right. We had no way of knowing who would be packing it six months from now. We might have been buying it from another source.

Q That wouldn't make any difference?

A No, sir. We were selling a brand—Miss Virginia.

MR. LUKINGBEAL:

I ask the reporter to read back the last exchange.
(The reporter read a portion of the record.)

By Mr. Hays:

Q It wouldn't make any difference who was packing it?

A We were trying to establish our brand—Miss Virginia.

Q It wouldn't make any difference if the Westerville Creamery Company was packing it or any other company?

[954] A No, sir.

MR. HAYS:
That's all.

* * * *

[957] ANDREW JEFFERSON BERRY, JR.,
recalled as a witness, having been previously duly
sworn, was examined and testified further as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

* * * *

[959] Q Mr. Berry, at the time you came with the Borden Company in 1936, what were the principal products in the food line generally being sold by the Borden Company?

A At that time the Borden Company was marketing Borden Brand evaporated milk, Borden's Eagle Brand condensed milk, and a number of other brands of sweetened condensed milk, all under the Borden name, but with additional local names; Borden's malted milk; Borden's hot chocolate; Borden's caramels; Borden's None Such Mince Meat; Borden's malted milk crisps, which was a candy-type confection; Borden's fluid milk, and Borden's ice cream.

Q You have referred to each of those items as Borden's. Does that mean that the name "Borden"

appeared on each of the packages or containers as distributed to the consumers?

A Yes. The name "Borden" appeared prominently on each package.

Q Of those various Borden products that you have just named, were those as of 1936 new products that Borden was then just commencing to market?

A No, sir. They were products that had been marketed over many years.

Q They were well-established Borden products on the market, is that right?

[1960] A That's correct.

Q I show you a copy of the complaint in this case and direct your attention particularly to Paragraph 5 on page 3, where there is set out a list of evaporated milk manufacturing plants of the Borden Company. Will you tell us whether Borden manufactured evaporated milk at all of those plants during the entire complaint period?

A Yes, sir. Evaporated milk was manufactured at each and every one of these plants. Subsequently, the Perrinton, Michigan plant has been closed, but I don't recall the exact date.

Q Do you recall whether the Perrinton, Michigan plant was closed during the complaint period?

A Not specifically, Mr. Lukingbeal. I don't think it was, but I really don't recall the exact date.

Q Did the Borden Company at any time during the complaint period manufacture evaporated milk at any plant other than the ones listed there in the complaint?

A No, sir.

Q Mr. Berry, you referred a moment ago to a sterilization process to which the cans of evaporated milk

were subjected after they had been filled and sealed. Will you tell us, Mr. Berry, the considerations that applied thereafter with respect to the storage of those cans of evaporated milk?

MR. HAYS:

Is this during the time period of the [961] complaint? He referred to that as before the complaint.

MR. LUKINGBEAL:

I mean the question to apply during the time period of the complaint, yes.

A Yes, sir. After the manufacture and the process of the milk is completed and it is placed in cases, it is then stored at different locations. The first location at which it is stored is what we call plant storage, that is, storage facilities and rooms located right at the evaporated mill plant itself. In addition to that, there is what is referred to as reserve storage warehouses. These are outside cold storage warehouses.

* * * *

[962] Q During the complaint period, approximately how many of those reserve or cold storage warehouses were used by the Borden Company in connection with evaporated milk?

A There were about fifteen, Mr. Lukingbeal.

Q In general, with reference to your plant locations, where were these cold storage warehouses?

A Generally speaking, the reserve or cold storage warehouses were located some place between the

plant and the area or market in which we expected or anticipated distributing the evaporated milk.

Q Were those warehouses owned by the Borden Company?

【963】 A No, sir. They were independently owned warehouses, public warehouses.

Q Besides your storage facilities at the plants and the fifteen or so reserve storage warehouses, did you use any other storage facilities in connection with your distribution of evaporated milk?

A Yes, sir. There was a third category of storage facility, which we referred to as consignment warehouses. These were public warehouses located in the various cities scattered around, and Borden's evaporated milk was stored in these warehouses temporarily prior to distribution locally in that particular area.

Q About how many of the consignment warehouses did the company use during the complaint period?

A There was some variation, but they ran between 90 and 100, I believe.

Q Did those consignment warehouses have cold storage facilities comparable to the facilities of the reserve warehouses?

A No, sir. These consignment warehouses would be public storage facilities that I would say were room storage facilities. They were used for all types of dry products, grocery products.

* * * *

【964】 Q Mr. Berry, what was your business objective in making use of these consignment warehouses

as distinguished from simply filling the orders out of the plant stocks or the reserve warehouses?

A The use of consignment warehouses is necessary primarily to hold your freight cost down.

Q What do you mean by that, sir?

A We moved Borden's evaporated milk from the plants, or from reserve storage warehouses, in carload lots to obtain the benefit of the carload freight rate. We moved these cars into the consignment point. That is gaining the benefit of the carload freight rate; and then the milk was redistri-^[965]buted from the local or consignment warehouse in less than carload quantities to the local trade as they needed it. So in addition to the holding of the freight costs down, the consignment warehouse serves as a method of distribution to deliver small lots of evaporated milk promptly to the trade.

* * * *

Q Mr. Berry, it has been mentioned from time to time previously in this case that the other two advertised brands of evaporated milk were Pet and Carnation. Do you know whether those two companies made use of consignment warehouses in their distribution systems?

A Yes, sir, they do.

Q They were also in a position to make prompt deliveries of orders from consignment warehouses?

A Very definitely.

Q Mr. Berry, did the private label evaporated milk packed by the Borden Company during the complaint period go through these consignment warehouses?

A No, sir.

Q Did any of it go through?

A No, sir.

Q How about the reserve or cold storage warehouses?

A No, sir.

[966] Q None of it went through them?

A None at all.

Q All of it was stored at the plants until such time as it was picked up by the customers; is that right?

A That's correct, sir, held at the plants only.

Q Mr. Berry, the earlier testimony in this case has shown that the Borden Company sold the Borden brand evaporated milk on a delivered price basis and that the delivered price at any given time was the same throughout the country. We have mentioned here this morning that during the complaint period Borden had some eight or nine different plants at which it was manufacturing evaporated milk, and those are quite widely disbursed over the country, running from California, Illinois, over into Pennsylvania, down into the south. Will you tell us, Mr. Berry, what, if any, production and distribution planning was done by the Borden Company with respect to putting itself in a position to deliver the Borden brand evaporated milk wherever it might be ordered throughout the country?

A In general, there was a great deal of planning necessary. In the first place, we would have to make up estimates of sales for at least a year in advance by months, and these estimates of sales by territory and by area would in turn have to be coordinated with the production for these various different plants, with

a view to having on hand at any time, at any [967] given time, the correct quantities of stock to satisfy the market conditions, and also with a view to have some inventory control, so that we did not end up the year with too little stock or too much stock. In other words, the requirement of sales and the production had to be coordinated in such a fashion that the trade would receive prompt delivery and we would have adequate stock available to satisfy the market demands wherever they might be at any particular time during the year.

Q In that planning, will you tell us whether any consideration was given to the freight rates and the tariffs from point to point?

A Yes, sir. From a good business standpoint, it was very natural that we would endeavor, or did endeavor at all times, to service any given market from the plant or reserve warehouse location that would give us the lowest freight rate to that particular market. This was the objective that you had to keep in mind at all times. Obviously we were not anxious to incur extra freight costs.

Q Were you during the complaint period successful in reaching that optimum freight objective?

A I don't think that 100 percent success is ever obtained. But to more specifically answer your question, there are always factors that upset the best plan. So that the optimum is not and was not obtained. There are disruptive factors [968] and influences that upset the schedule so that we could not completely follow the plans that we had laid down.

Q What factors during the complaint period, Mr. Berry?

A There were a number of factors. For example, one of the factors that applied was the program that we have for rotation of stock.

Q What do you mean by that?

A Rotation of stock simply means, in a broad term, that you endeavor at all times to ship, upon receipt of order, the evaporated milk that is at that particular time the oldest that you have on hand; in other words, we did not ship milk, we will say, that was ten days old if we had other milk available that was 90 days old.

Q Even though that other milk might incur a somewhat higher freight rate?

A No, sir. If you have a rotation program, then you have to follow the rule that whatever the time limit that you set, you must fill your orders with the milk that is the oldest at the time the orders come in. Otherwise you don't have a rotation program.

Q Were there any other factors that entered into the extent to which you were able to conduct your business under optimum freight expense conditions?

A Yes. There was another very important factor, which was market increases in price; that is, price increases where the [969] selling price of Borden brand went up. When these market increases occurred, they were most disruptive from the standpoint of the distribution system.

Q Why was that?

A I guess it's a peculiarity of the evaporated milk business that when a price increase occurs, the trade generally buys very heavily, and they buy or bought anywhere from two to three times their normal purchases.

Q You are speaking now of the period between the time when the price increase became known to the trade and the time when it became effective?

A That's correct.

Q What happened when they turned in the unusually large orders, two or three times as many as usual?

A When that happened, you were faced with the necessity of shipping and filling these orders quickly and rapidly, and you had, within a very short period of time, to satisfy orders which, I say, were two or three times the normal. So you were in a position where you had to grab milk at whatever point you had it and transship it and ship it as rapidly as you could to fill these orders immediately.

Q Did you have any of these price increase situations during the complaint period?

A Yes, sir. There was a price increase in 1956, I believe, in the late spring, and there were two price increases in 1957, [970] one in March and the other one in November, I believe, of that year.

Q You mentioned that your planning had included planning at the production end as well as the projected sales end. Did your plans from the production standpoint work out?

A There were other factors that affected production. For example, there was the factor of the production or availability of fluid milk in an area around a local plant. If the farming conditions in that particular area had been temporarily or over a long period of time a drought, then naturally the available milk supply in that particular area went down, and you had less production at your plant.

Q Than you had anticipated when you made your plans?

Q Did you have an example of that during the complaint period, Mr. Berry?

A Yes, sir. Ft. Scott was a plant that was adversely affected from the standpoint of availability of supplies. It traced back to drought conditions.

Q What about the converse: extra good pasture or milk-producing conditions in the area?

A Yes, that occurs also. Especially where you had a period where the pasture conditions were unusually good, then your total milk supply during that period was higher. So you had more production at that particular plant than you had originally [971] estimated or counted on.

Q Are you suggesting, Mr. Berry, that Borden was in some way committed or obligated to take on whatever was produced in that area, of the raw milk?

A Yes, sir. You have dairy farmers that bring their milk into your plant. When the farmer arrives with this milk, you take what he brings in. You don't say, "Look, I only need eight cans today. You can take the other two cans back." You take what he brings in.

Q So that you might have to produce more evaporated milk at a particular plant than you had planned in advance; is that right?

A That's true, sir. Another factor that affected the production was the factor that in certain marketing areas the fluid milk end had the first call on evaporated milk. If the fluid milk requirement was for a given period higher than normal, then you had less milk for manufacturing at that plant for evaporated, and the converse was also true.

Q By fluid milk, do you mean milk for sale to consumers as fresh milk?

A Yes, sir.

Q Was there any particular example of that kind of problem during the complaint period?

A The Wellsboro plant is subject to call in the New York City area on part of fluid milk. If the requirement for fluid [972] milk goes up, we may and do have less at Wellsboro for production of evaporated milk. The converse is also true.

Q That is, the Borden Company itself, for its fluid milk operations, diverts some of those supplies?

A That's correct.

Q What about other dairy products besides fluid milk? Do you run into competition from them for the raw milk supplies?

A Yes. One of the outstanding examples, I guess, is cheese manufacture, or plants that are producing cheese. From time to time they may bid the price of milk up to get more milk for cheese, and you in turn have to meet that bid price, or else you lose some of your farmers in that particular area. So you do have competition for the milk at any given location in addition to the fluid milk requirements.

Q Competition which may result in your producing more or less evaporated milk at a particular plant than you had counted on?

A That's correct.

Q In getting this evaporated milk around to the channels of distribution, you depend on truckers, railroads, warehousemen; is that right?

A Yes, sir. We use railroads to a great extent; we use trucks; and naturally you avail yourself of the fa-

cilities of warehouses. So that you are subject to the possibility of a strike on the part of truckers or warehousemen, in which case [973] that would definitely have an effect on the distribution pattern.

There is another factor that affects your distributive function. Generally speaking, the trade allows their floor stocks in warehouses to run down at the end of the year, because floor stocks in chain and jobbing warehouses in many states are subject to a year-end tax. So they like very much to let their stocks go down to a minimum at the tail of December and place their orders with shipping dates so that all of the orders are delivered immediately after the first of the year to avoid the tax. I think you can appreciate that if you get a break on many orders, all with shipping dates, and all desiring arrival we will say the second or the third of January, this can create a hardship on your delivery and distribution function.

[974] Q And results in shipping in ways that might not be the most economical; is that right?

A That is correct, sir, because knowing that the stocks are down low, you have to get the goods in there. If you don't, you may be out of stock on the shelf for a week or ten days. If that happens, you have lost a lot of business.

Q So you may have to fill those orders from some plant other than the one you might initially have planned to serve that particular location from?

A That's correct.

Q You have been talking about the advance planning that was done by the Borden Company, and then you talked about these different situations that would arise that caused some disruption, and that it had to

be dealt with. Where within the Borden Company was this advance planning and this general distribution operation carried out?

A The advance planning, from the standpoint of making up sales estimates, sales of Borden brand evaporated milk, was done by myself. But then these sales estimates were in turn given to the production department, and it was the function of the production department to indulge in all of the advance planning from the standpoint of production and from the standpoint of allocation of orders to the plants or to outside storage points to satisfy those orders.

Q You are speaking of the production department at the [975] company's head offices in New York?

A Yes, sir, 350 Madison Avenue.

Q This was not a decentralization problem?

A No, sir, it was not. It had to be controlled and centered at the head office.

Q That is, not only the planning, but also the measures necessary to keep the merchandise flowing, had to be controlled from the head office; is that right?

A Yes, sir. Otherwise you couldn't possibly satisfy your orders and your market conditions. There had to be central planning at all stages in the game.

Q Would you tell us just a little about the way the Borden brand evaporated milk orders were handled? Let's take first an order for a carload shipment of Borden brand evaporated milk. What was the usual procedure there?

A The order for a carload quantity was sent in to 350 Madison Avenue from the originating point. This order went to the section of the production department which handled allocation of that order. The order was

then allocated by production to be shipped from a plant or from a reserve storage warehouse, and that order was then moved by car direct to the customer.

Q You spoke of the order being allocated when it came in. What do you mean by that?

A I mean that the particular people in the production [1976] department who kept the control over the various storage points and the amount of storage at the various plants and who watched the rotation that I have mentioned would take this particular order and allocate it to a particular storage warehouse or a plant in accordance with the age of the milk and the rotation system at that time.

Q In other words, they decided from where that particular order was to be filled?

A That's right.

Q In other words, there wasn't any automatic set up under which orders from any given city automatically were filled from some given plant or warehouse is that right?

A No.

Q Each order had to be considered by the responsible people here in New York, and they had to reach a decision as to where that particular order might be filled from?

A That is correct.

Q What about orders less than carload lots of Borden's evaporated milk? How was that handled?

A The smaller orders were taken in a given city and were automatically filled by the local people, that is, the broker or the local sales office, out of the consignment warehouse that I mentioned before.

Q Who determined from what plant or what reserve warehouse shipments to consignment warehouses should be made?

[977] A That was also determined by the production department, by the same people who handled customers' orders and allocated customers' orders.

Q I believe it has been mentioned in this case that the evaporated milk operation was a part of the business of the food products division of the Borden Company; is that right?

A Yes, sir.

Q Did the food products division during the complaint period have any budget for the advertising of Borden brand evaporated milk?

A Yes, sir, we did.

Q Did you personally have anything to do with the spending of those moneys?

A Yes, sir. As product manager, one of my responsibilities was to prepare, for any given year, two budgets. One was the advertising budget and the other one was the merchandising or promotional budget.

Q Would you tell us, Mr. Berry, just in general, what was the difference in the things covered by those two budgets?

A Yes, sir. The advertising budget was a budget that contained in it moneys for expenditure of media such as radio, newspapers, magazines, et cetera; consumer material, such as recipe leaflets; point of purchase material that is placed at the point of sale in grocery stores. The promotional or merchandising budget was a separate budget which contained [978] moneys for merchandising, for promotion, for store sales, for house-to-house work, and there were a num-

ber of different promotional type of items that were included in that merchandising and promotional budget as opposed to the advertising budget.

* * *

[979] Q In addition to the advertising budget for Borden brand evaporated milk that was administered by the food products division of the Borden Company was there any other advertising budget within the company that had anything to do with the Borden brand evaporated milk?

A Yes, sir. There was the budget that we called "All Borden." This was the advertising done by the general advertising department of the Borden Company, the parent company. This budget was used on behalf of the Borden Company to further the Borden name and to advertise and promote the various different products sold under the Borden name. This was the general company, over-all umbrella-type advertising. We call it institutional-type advertising.

Q Is that what paid for Elsie the Cow?

A Yes.

Q And Elmer?

A Yes.

Q In the accounting within the company in the usual course of business, was the Borden brand evaporated milk charged with any part of the amounts spent through the all-Borden advertising budget?

A Yes, sir, it was.

Q Do you know who determined what that amount was?

A Not specifically, Mr. Lukingbeal; but that determination was made by the top executives of the parent Borden Company, [980] just which one, I couldn't say.

Q Did they make similar determinations with respect to the charging of other Borden name products with portions of that all-Borden advertising expenditure?

A Yes, sir, they did. A determination was made that each Borden product would be charged with so much, and that money on the sales that were accumulated during the year went to the general advertising department for the general advertising I have spoken of.

Q Did the allocations of portions of the all-Borden advertising budget to particular products add up to the entire amount in the budget? In other words, did they split up the whole pie?

* * * *

[981] A As a general rule, the amounts that were contributed by the various Borden products, including Borden brand evaporated milk, this sum was then, generally speaking, matched, that is, doubled, by the parent company, to create the total all-Borden advertising fund. In other words, as a rule of thumb, roughly fifty percent was contributed by products and the other fifty percent by over-all management of the Borden Company.

* * * *

[982] Q Mr. Berry, I show you Respondent's Exhibit 10 for identification. Will you tell us what that is, if you know?

A This is a tall size and also small size label for Borden's evaporated milk, which is the label used in the western part of the United States.

Q And this is the one that has the gold cow, the picture of the ~~g~~ cow, on it; is that right?

A Yes.

Q I show you Respondent's Exhibit 9 for identification. Would you tell us what that is?

A This is a tall size and small size label for Borden's silver cow evaporated milk, which label is used in the balance of the United States other than the far west, where the gold cow is marked.

Q I show you Respondent's Exhibit 11 for identification. Will you tell us what that is?

A This is a tall size and small size label used. It is Borden's silver cow Pearl brand evaporated milk. This is a label that is used in two specific cities and the immediate vicinity.

Q What cities are those?

A Baltimore, Maryland, and Buffalo, New York.

Q How did it happen that in those cities you use a label which includes the name "Pearl," whereas you don't in the **[983]** others?

A This is a historical point. Originally there was a localized brand known as Borden's Pearl brand. That was a very strong factor in Baltimore and Buffalo. Gradually over the years, in our effort to adapt a single national label, this Pearl brand has become Borden's silver cow-Pearl.

Q As it appears on Respondent's Exhibit 11 for identification?

A Yes.

Q Mr. Berry, during the complaint period, were each of these three labels, Respondent's Exhibits 9, 10 and 11, being used?

A Yes, sir, they were.

Q Were these during the complaint period the only labels being used by the Borden Company for its Borden name evaporated milk?

A They were the only labels used by the Borden Company for business that went to consumers. There was an additional label, Borden's evaporated milk, on No. 10 tins, which was sold to the baking trade and candy manufacturers only.

Q Referring again to Respondent's Exhibit 10 for identification, the one with the gold cow on it, in the middle of each of those labels there is something which says "Red Scissors Coupon." Can you tell us what that was about?

A Yes, sir. The red scissors coupon, and the coupon [984] appearing on this label, is part of an advertising and merchandising plan that is used in Borden's brand evaporated milk. There is an organization known as Premium Associates, Inc., which maintains a large number of premium redemption points throughout the United States. The red scissors symbol is owned by this particular corporation. The grocery products that are serviced in their premium plan have the right to use the red scissors coupon symbol. They act for the various products that are part of this plan, secure the premium merchandise, and when consumers save these coupons and other similar coupons from

other products and take the coupons into these premium redemption points and turn them in, they receive in exchange free gifts, roughly 800 different types of free gifts that they get in exchange of coupons.

* * * *

[986] Q Going now to the Borden Company's arrangement with Premium Associates, Inc. with respect to the handling of this premium redemption program, how did Premium Associates get paid for its work in this connection?

A Premium Associates charges each of the companies whose products are in the plan and which products carry the premium coupons a charge of 65 cents per 100 coupons actually redeemed. In other words, \$6.50 a thousand for each thousand coupons Premium Associates collects or takes in from consumers at these hundreds of redemption outlets, the company concerned pays 65 cents per hundred of \$6.50 per thousand.

Q Does that payment by Borden's to Premium Associates cover both the reimbursement of Premium Associates for the merchandise that is used in this program and the services of Premium Associates?

A Yes, sir. It is the full charge for the handling of the coupons, the purchasing of the premium merchandise, the maintenance of the redemption location, and acting on behalf of the company. It does not include the cost of the premium catalogues that we use extra for promotional purposes; but **[987]** the charge that I mentioned, the 65 cents, does cover the premium

merchandise, the collection of the coupons, the tabulation, and the accounting to the company for it.

Q Roughly how many of the coupons that are put out on the market by Borden through sales of Borden brand evaporated milk do get redeemed?

* * * *

HEARING EXAMINER LIPSCOMB:

You may answer the question to the best of your ability.

A About 67 to 68 percent.

Q Does the Borden Company own any of the stock of Premium [988] Associates?

A Yes, sir.

Q How much?

A Borden is a quarter owner.

Q 25 percent of the stock?

A 25 percent.

Q Has Premium Associates ever pay Borden any dividends on that stock?

A No, sir. It is a service organization.

Q Are you personally an officer or director of Premium Associates?

A At the present time, I am.

Q What?

A I am a director.

* * * *

Q Mr. Berry, did the B o r d e n Company use the services of [989] brokers in connection with the distribution of Borden's brand of evaporated milk?

A Yes, they do.

Q What was the function of the brokers?

A The function of a broker was to act as a wholesale representative in the market in which he operated; that is, a person who contacted the wholesale trade, consisting of chain store headquarters and grocery jobbers, or wholesalers.

Q Were the brokers employees of the Borden Company?

A No, sir. They were an independent concern.

Q Did they handle items other than those of the Borden Company?

A Yes.

Q How were they compensated for their services?

A Brokers were paid commissions or brokerage on the goods that they sold.

[990] Q In respect of sales of Borden brand evaporated milk, how much commission was paid?

A We paid our brokers five cents per case for each case of tall size Borden's brand evaporated milk they sold, and two and a half cents per case for the small case of 48's.

Q Did the brokers receive any compensation of any kind that was computed on the basis of any sales of private label evaporated milk packed by the Borden Company?

A Yes, sir. We allowed them half brokerage. We allowed them two and a half cents a case, tall size basis.

Q What service did the brokers perform in that regard?

A In connection with private label sale?

Q Yes, sir.

A The brokers performed no service whatsoever.

Q Then why did you pay them compensation that was computed in respect of sales of the private label?

A It is a fact that many years the brokerage on evaporated milk has not changed. They have been receiving five cents per case for years, even though the selling price of the product has gone up. There has been a considerable amount of agitation and feeling on the part of the brokers that they should receive increased brokerage on evaporated milk, Borden's evaporated milk. Because of this over-all situation, and because we wanted to encourage our brokers to continue to be loyal and to do everything possible to promote the Borden [991] brand, we allowed them half brokerage on private labeling going into their area, even though they had no service to perform in connection with it.

Q Mr. Berry, do you recall roughly what was the lowest price at which the Borden Company sold Borden brand evaporated milk since the time you have been with the company?

A Yes, sir. When I came with the company, the price was \$3.20 a case.

Q What was the amount of the brokerage commission paid by the Borden's Company at that time?

A Five cents per case.

Q The same as it has been after the price has gone up to \$6.60 a case; is that right?

A That's correct.

Q Were the brokers during the complaint period the only people who contacted any of the wholesale trade on behalf of Borden?

A No, sir. We had jobbing salesmen in certain territories who also contacted the wholesale trade.

Q How did it happen that some places it was brokers and some places it was jobbing salesmen?

A Where the Borden Company maintained for its foods division a local Borden office, then generally in that particular location we had no broker. The local salesmen attached to it and the jobbing [992] salesmen performed the wholesal function. Where an office of that nature did not exist, then we used the services of brokers.

Q I take it from what you say that the jobbing salesmen were employees of the Borden Company.

A Yes, sir, they were.

Q They were not selling products other than those of the Borden Company?

A No, sir.

Q About how many jobbing salesmen did you have during the complaint period?

A About twenty.

Q In addition to the brokers and the jobbing salesmen, were there any other Borden people, or people acting on behalf of Borden, out in the field with respect to Borden brand vaporated milk?

A Yes, sir. There were the field representatives, or general retail salesmen.

Q About how many of those did you have?

A In excess of 200.

* * * *

[993] Q During the complaint period what did these retail salesmen do?

A In connection with Borden brand evaporated milk, the retail salesman's job was to call on retail grocery outlets to do everything he possibly could to get the very best shelf location for Borden's brand evaporated milk. By that, I mean that the optimum shelf position is at eye level. That is the best position in the store. It was his job to try to get for Borden brand such a position, rather than one down too low or too high.

[994] It was also his job to get as many rows on the shelf of Borden's brand evaporated milk as he possibly could; and in doing that, to maintain at all times a semblance of stock rotation on Borden brand in that particular store, to make certain that the oldest stock was rotated.

Q How did you — how did he make certain of that?

A By examining the code marks on the cans and by going into the back room and examining the code marks on the stock in the back room. It would be very easy for a case on the bottom of the pile to stay there and become old when it should be rotated and put on the shelf. The importance of that is that if that happens, a case that is very old and sat there for a long time and then is put on the shelf, you might get a complaint.

Q On the can itself, where were those code marks?

A The code mark is on the bottom of a can.

Q So you had to pick up the cans and look at them on the shelves?

A Yes, sir.

[995] Q What else did the retail salesman do?

A Aside from this shelf rotation and this continual battle of trying to get more shelf space and the optimum shelf space —

Q Better than your competitors had, is that right?

A That was a l w a y s the object. Very often the shelves themselves would be partly emptied, and the salesman, wherever possible, would stack o u t milk and fill the shelves.

Q You mean go back into the back room and get it and bring it out?

A Bring it out, yes, and fill the shelves. In addition to the servicing of the shelves, it was the salesman's merchandising and promotional responsibility to put out point of purchase or point of sale material that I mentioned before, and whenever he possibly could do so, to get permission from the store owner to build a display in the aisle, at the end of the aisle or in the aisle, that is, physically to build the display and get the milk off the shelf out on to the floor location, in a master display. Those are normal merchandising practices.

In addition to those merchandising and promotional functions, naturally the salesman's job was to see that the [996] retailer carried as much Borden brand evaporated milk as he possibly could to avoid any possible out of stock, and simply because it is a fact that if a store carries extra stock, they will find ways to sell it. They will move extra milk. Other than that, the salesman very often arranges for what we call a store sale, which simply meant he would build a display and come in on a particular day and stand at the display and actually sell the merchandise, Borden's Evaporat

ed Milk, from the display by talking to consumers who come into the store.

Q What did he tell the consumers?

A The sales pitch that is used is a very natural one, namely, that there is no better brand of evaporated milk than Borden brand, it is well known, it stands for quality, and the cost is no more than the other advertised brands, yet the Borden brand offers the consumer a premium coupon, which she can save and in turn redeem at a later date along with coupons from other grocery products for free merchandise. The salesman on a store sale will contact consumers, talk to them, tell them their story, show them the premium catalogue, the fine gifts she can get, and actually sell her on trying Borden brand evaporated milk, if she is not a customer at that time.

* * * *

[998] Q You were speaking this morning of the storage of Borden brand evaporated milk in the reserve or cold storage warehouse, and you mentioned the temperatures at which that cold storage takes place.

A Yes, sir.

Q Was it during the complaint period the practice to ship milk out of those cold storage houses directly from that ordinary cold storage temperature?

A No, sir. Any milk that is stored in a reserve or cold storage warehouse has to go through a process known as tempering before it can physically be shipped.

Q Why do you have to do that, Mr. Berry?

A Because if the milk in the particular case, we will say, is 50 degrees and it is brought out of that and then placed [999] in a freight car and shipped, especially in the spring or summer and fall, with a temperature higher than that, there will be a physical sweating as a result of the difference between the air temperature and the temperature of the milk. This sweating in turn would result in the cans becoming rusty and the labels unsightly at a later date.

Q How long does this tempering of the milk take?

A About thirty days; up to thirty days.

Q That consists of a gradual increasing of the temperature at which the cans are stored?

A Yes.

Q So that the mere fact that you have or had in your inventory at any given reserve or cold storage warehouse a stated number of cases of evaporated milk didn't necessarily mean that you had those available for shipment at that particular time; is that right?

A No, sir. They could not be shipped until they were tempered. Before they are released for shipment, they have to be checked to make sure the temperature is high enough for them to be shipped without incurring the possibility of sweating.

* * *

[1000] Q Going back to the 200 or more retail salesmen that the Borden Company had out in the field during the complaint period, [1001] did those retail salesmen act only with regard to Borden brand evaporated milk, or did they act with regard to other products as well?

A The full line retail salesmen, which is the term that we use, their function was to act for distribution, promotion and merchandising of all Borden food products, including Borden Brand Evaporated Milk.

* * * *

[1005] Q Did the Borden Company in the year 1957 ever itself pack for sale to its customers packages of six cans of Borden brand evaporated milk?

A By pack, Mr. Lukingbeal, you mean at the plant?

Q Yes, sir.

A Let me answer the question this way. We use, as a promotional device, a so-called six-can carrier and also a four-can carrier, where the salesman in the field takes this carrier and physically puts the cans in the carrier so that a person can get six cans at one time and have a little carrier to take it out in. There was a period in which we tested the actual packing of such a carrier at the plant. We tested that over a period of about a year and a half. I believe that such a market test did fall within the complaint period, but frankly I would have to check our records to determine when that test was made.

Q You mentioned that the field representatives went out in the field and put these cans in the carriers. Is that part of the activities that they performed during 1957?

A Yes, sir.

Q They did that in the stores?

A Yes, sir.

* * * *

【1011】 Q Were any promotional efforts in respect of Borden brand evaporated milk made in 1957 otherwis than through **【1012】** the retail stores, as you have just been describing?

A Yes, sir. There were efforts made by the broker and the jobbing salesmen in contacting the wholesal trade. It was their function to sell, take orders, for al the Borden brand Evaporated milk that they possibl could on each and every call, and if they found tha in a particular account the distribution of Borden brand evaporated milk was non-existent or was lack ing it was part of their function to persuade the ac count to handle Borden brand evaporated milk; in oth er words, to increase distribution.

Q What instructions did they have as to the sale pitch or argument that they were supposed to make

A The general approach in a situation like tha would be that Borden brand evaporated milk was on of the best-known and one of the national products that the Borden name was extremely well known, an from the standpoint of satisfying Mrs. housewife an Mrs. consumer, the retailer should definitely carr Borden evaporated milk. If he did not have it whe she came in, it is a fact that a great many customer who demand a particular product and not finding tha product in the store will go elsewhere to do their sho ping, so that the retailer in turn will lose some of h trade and some of his sales that he would otherwis make if he carried what the customers wanted.

Q Were the housewives, t h e consumers, directl contacted **【1013】** by representatives of the Borden Company otherwise than in connection with the stor sales which you mentioned this morning?

A They were contacted through advertising.

Q What about the medical profession?

A Yes, sir. That was another area of contact. A good deal of work was done by special evaporated milk men, and also from time to time by the full line retail representatives, in contacting doctors, hospitals, charity clinics, out-patient departments of hospitals, formula rooms, et cetera, to get the doctors to recommend, for infant feeding, Borden brand specifically, and to get the hospitals to carry Borden brand for use in their house formulas, for infant feeding purposes.

* * * *

[1014] Q Were Pet and Carnation using the same general type of field-force operation in 1957 that Borden was?

A Yes, sir.

Q They had their fellows in the various retail stores trying to get some shelf space away from you, is that right?

A They sure did.

* * * *

[1015] Q Mr. Berry, what was the Borden Company's business reason for selling the Borden brand evaporated milk on a delivered basis with the same price throughout the country?

A The Borden brand evaporated milk competition is or was on a national basis Pet and Carnation. In certain local areas, Pet and Carnation both had additional brands that were marketed in those areas at

the same prevailing price as Pet and Carnation. In other words, our competition was not only Pet and Carnation, but some of their subsidiary brands in [1016] local areas. Being in competition with them, we had to establish a distribution setup and a price that was at all times equal and in competition with those brands that we were fighting against.

* * * *

[1017] Q Mr. Berry, in the year 1957 was there any jobbing salesmen, any of the 20 jobbing salesmen that you have talked about who had any duty or responsibility in respect of p r i v a t e label evaporated milk packed by Borden?

[1018] A No, sir.

Q Was there any other man or men on the Borden payroll who had any duty or responsibility to get in touch with the wholesale trade with respect to private label evaporated milk other than yourself?

A No, sir.

Q Was there in that year any of these 200 retail salesmen that you talked about who had any duty or responsibility in respect of private label evaporated milk packed by Borden?

A No, sir. They had no responsibility or duty connected with it whatsoever.

Q Was there any other man on Borden's payroll who had any duties to go to visit any retail store, or any consumer, or any doctor in respect of private label evaporated milk packed by Borden?

A No.

* * * *

[1021] Q Did the Borden name appear on any of the cans of Cherub evaporated milk packed for Safeway during the complaint period?

A No, sir.

Q I do not see the Borden name on any of these other labels I have shown you, Respondent's Exhibits 13, 14 and 15 for identification. Did the Borden name appear on any of the labels of any of the merchandise packed for any of those customers during the complaint period?

A No, sir, it did not.

Q What about the packing cases, Mr. Berry? Did the Borden name appear on any of those?

A No, sir.

Q Did the Borden name appear anywhere at all on the merchandise as it left the Borden door?

[1022] A The Borden name never appeared in any fashion on Borden-manufactured merchandise — on the cases, on the label, or anywhere else.

Q Did you have any understanding with your private label customers as to whether they were or were not entitled to use the Borden name in any way in connection with this private label merchandise?

A They were not entitled to use the Borden name in connection with their private label evaporated milk. The understanding was that they would not do so.

Q Did you at any time during the complaint period take any steps to police or enforce that understanding?

A Yes, sir.

Q What steps?

A At one stage during the complaint period a report was received that the Thomas & Howard house, in Greensboro, North Carolina, their salesmen of that

particular house were reputed to be telling the trade that this milk, u n d e r the Miss Virginia label, was packed by Borden Company, and upon receiving this report, one of our representatives in the area called on the Thomas & Howard house and talked to them about it and asked them to please desist, which they did.

Q Were there any other instances during the complaint period?

A I can remember two specific additional instances. One involved a wholesale grocer in the area or around Knoxville. [1023] I don't think he was located in Knoxville, but nearby. His wholesale salesmen or jobbing salesmen were telling the retail trade that the Good Hope label that they sold was packed by the Borden Company, and our broker went over and talked to them and got them to stop that practice.

There was an additional instance. We received a telephone call in New York, at headquarters, from the Winn-Dixie headquarters in Jacksonville. They claimed that our plant manager, from the Chester plant, had gone into one of the local Winn-Dixie chain stores and had told the store manager that the Thrifty Maid label was packed by the Borden Company, and the Winn-Dixie headquarters, in accordance with our understanding, asked us to please do something about it. Through our production department, we contacted our plant manager and told him not to do it. The Winn-Dixie people did not want their store managers to have that information.

Q Why not?

MR. HAYS:
Objection.

HEARING EXAMINER LIPSCOMB:

The objection is overruled.

A It was not to the advantage of either the Borden Company or to any distributor of any private label to have it generally known that the Borden Company provided or packed this particular milk. It was not to his advantage and it was not to our advantage.

[1024] Q Why was it not to the Borden Company's advantage?

A Well, obviously the Borden name did not appear anywhere on the merchandise. As far as the Borden Company was concerned, at some future date they might no longer be acting as a supplier for that particular brand of milk in that locality, and if they were not, they certainly didn't want their name used and attached to the marketing of the product when at a future date somebody else might be packing it. That might be a possibility.

Q From the standpoint of Winn-Dixie, why did they not want your store manager mentioning to their store manager that Borden had packed that private label?

MR. HAYS:
Objection.

HEARING EXAMINER LIPSCOMB:

To the extent he may know, let him speak.

A The distributor or owner or marketer of any private label evaporated milk is interested in selling his product and establishing some reputation for that par-

ticular product. In other words, he wants his own brand, in this case Winn-Dixie wanted their own brand, to stand on its own two feet. They wanted to develop some kind of consumer acceptance and brand franchise for the Thrifty Maid label. It was not to their interest to trade on the Borden label in connection with Thrifty Maid.

Q You have told us that Borden spent no money advertising [1025] private label evaporated milk, it spent no money in respect of any sales force or any other representatives in the field, it sold the merchandise FOB plant, it did not have its name on the item in any way and did not permit use of its name in connection with the private label merchandise. Mr. Berry, can you think of any expenditure of any sort, in respect of any sort of private label evaporated milk, after it left the factory door, which you in any way looked upon as being made for the private label evaporated milk?

MR. HAYS:

Objection. It calls for a conclusion.

HEARING EXAMINER LIPSCOMB:

I think it is one he ought to be able to make. He may answer.

A No, sir. I can think of no expenditure of any kind that applied.

Q The record in this case already shows that Borden commenced packing private label evaporated milk for Safeway about 1938 and that Borden took on some additional private label accounts on the west coast in 1955. I am referring to your testimony at

pages 114 to 117 of the transcript. Will you tell us, Mr. Berry, as of the beginning of the complaint period in this case, January 1, 1956, what were the elements that entered into the pricing formula that you were then employing with Safeway?

A The elements that made up the pricing formula consisted of the cost of the particular label, the Safeway label; the [1026] cost of the cartons in which the milk was packed; the hauling costs that applied at the particular plant; the average actual cost of the ingredients or milk in that particular case or carton for the month; and in addition, a factor known as cotm, which means costs other than milk.

Q What in turn was the cotm made up of?

A The cotm included the cost of the Vitamin D which goes into the milk, the fortification; the cost of the cans, it includes the plant processing and overhead cost, and it also includes a gross margin.

Q As of January 1, 1956, were you packing private label evaporated milk for Safeway at more than one of your Borden plants?

A Yes, sir.

Q Was the gross margin included in the c.o.t.m. the same at each of those plants out of which you were then packing for Safeway?

A Not exactly the same, no, sir. There was some variation.

Q What was the range of it?

A The range was from 20 to 28 cents.

Q Per case?

A Per case.

Q Mr. Berry, as of January 1, 1956, were you packing private label evaporated milk for all of the Safe-

way warehouses for which you had packed in the preceding two years?

[1027] A No, sir, we were not.

Q What were the exceptions?

A The exceptions in the beginning of 1956 were the Safeway warehouses at Seattle and Spokane, Washington; B u t t e, Billings, Montana points; Salt Lake City; Denver; Grand Junction; Pueblo; Phoenix, Arizona.

Q Looking at all of those Safeway locations as a group, over what period of time had you ceased to serve them?

A Just prior to January 1, 1956 we ceased handling for those points for a period of a year to a year and a half.

Q In other words, during the latter part of 1954 and the year 1955 you had ceased to serve the Safeway locations that you just enumerated?

A Yes, sir. I believe it was in 1954 and 1955, at different times when they dropped out.

Q Approximately what was the annual volume of your private label business with Safeway immediately before you lost any of this business?

A About a half a million cases a year.

Q Approximately what was the aggregate volume of the Safeway business at the lost locations that you have just enumerated?

A The ones I enumerated totalled up to about 200,000 cases. Naturally, there was some fluctuation from year to year, but it was about 200,000 cases.

[1028] Q Between January 1, 1956 and the time in mid-1956 when you took on Topco and CROG, did you lose any more Safeway business?

A Yes, sir. We lost the El Paso warehouse point, which serves that portion at the extreme portion of Texas and all of the State of New Mexico.

Q About how much volume of loss did that represent?

A 33, 35,000.

Q Mr. Berry, in respect of those Safeway locations, do you know whether Safeway continued to sell private label evaporated milk out of those locations?

A Through their stores? Yes, sir, they did.

Q How do you know that?

A From two sources. We have retail salesmen calling on the trade, and in calling on Safeway stores, they saw Safeway continuing to handle Cherub brand; and then further, from my own personal observation, as I mentioned earlier, I called on the trade when I made trips into the field and I personally saw the Cherub brand in stores served by those warehouse locations.

* * * *

[1030] Q Mr. Berry, at the time in the early part of 1956, when you had been losing the segments of the Safeway business to which you have referred, did you for purposes of your business thinking and planning reach any view as to who had taken that business from you?

* * * *

[1032] The objection is overruled, and you may answer the question to the best of your ability.

THE WITNESS:

Could I get the question read back?

HEARING EXAMINER LIPSCOMB:

Yes, you may.

【1033】 (Question read.)

HEARING EXAMINER LIPSCOMB:

You may answer.

THE WITNESS:

Yes, sir.

Q Who?

A In the Washington area, that is, the Seattle-Spokane segment, that portion had to be lost either to Carnation or to Consolidated, located in Mount Vernon, Washington, or to either Carnation or Pet or Pet Packing out of Idaho. As to the other portions, namely, Billings and Butte, Denver, Pueblo, Grand Junction and Phoenix, the only evaporated milk plants in Texas, in Colorado, in Utah, and in effect in areas that could serve those more efficiently, were Pet and Carnation.

* * * *

Q What about El Paso, Mr. Berry?

A El Paso falls into the same category. I know of only three companies that could have served that business. One would have been Pet, one would have been Carnation, and the other possibility would have been Page Milk Company.

Q What plant of the Page Milk Company are you thinking of?

[1034] A Coffeyville, Kansas, could have been the only point.

* * * *

[1035] Q Let us turn now, Mr. Berry, to t h e time around the middle of 1956, when you commenced to pack private label evaporated milk for Central Retail-Owned Grocers and Topco and Hillco. The record in this proceeding contains the invoices and so on to establish that date. Was there any particular event, Mr. Berry, which led to your commencing to pack private label for CROG and Topco?

A Yes, sir. Those two customers contacted us and asked us if we would pack their milk for them, because one of their suppliers had ceased packing evaporated milk and had converted his milk over to some other type, as far as marketing was concerned.

[1036] Q What was that supplier, if you know?

A That w a s the producer's creamery, of Springfield, Missouri.

* * * *

Q Did the pricing formula which was worked out with CROG and Topco differ from the one then being used with Safeway?

A No, sir. It was the same.

Q What, if you know, was Borden's business reason for continuing with that same pricing formula with respect to these two new customers?

A The business reason was a very logical one. Here was a pricing formula and an arrangement that we

had had in existence for almost 20 years. It had proved to be a satisfactory method of doing business. It was satisfactory to the Borden Company; it was satisfactory to Safeway. It had lasted for a long period of time, in spite of losing business here [1037] and there. It was something that we understood, that we had had experience with, and we naturally, in taking on additional accounts, adapted the same pricing formula for those accounts as we had in existence for Safeway rather than to go afield and devise a different system which we then would have had to go back and apply to Safeway and sell the Safeway Company on changing the whole thing.

Q Mr. Berry, the record shows that during the remainder of the complaint period Borden packed private label evaporated milk for a number of other accounts. Did you use that same pricing formula with respect to all of those accounts?

A Yes, sir.

Q Was it your business reason for doing so just as you indicated for CROG and Topco?

A Yes, it was.

Q I believe the record shows that when you commenced to serve CROG and Topco, you were packing private label evaporated milk for them at some plants out of which you had not previously packed private label evaporated milk for Safeway.

A That is correct.

Q Do you recall what plants that included?

A In connection with CROG and Topco, those plants that did not apply to Safeway would have been Lewisburg, Perrinton, Dixon, and New London.

[1038] Q Was it your understanding at the time, Mr.

Berry, that Pet and Carnation had evaporated milk packing plants in the general vicinity of the points you have just mentioned?

A Yes, sir.

Q In establishing your relationships with CROG and Topco in mid-1956, did you in respect of these additional plants use the same gross margin in your pricing formula, the same amount of gross margin, as you had previously been using in the plants out of which Safeway was being served?

A No, sir.

Q Mr. Berry, if you look at the entire complaint period and all of the plants out of which at any time during the complaint period the Borden Company sold private label evaporated milk, can you tell us what was the lowest gross margin included at any plant at any time and what was the highest?

A Yes, sir. The lowest projected gross margin applied to the Modesto plant and was fifteen cents. The range from that one low point was up to 35 cents a case.

* * * *

[1039] Q Mr. Berry, when we suspended for the recess, you just mentioned that during the complaint period the amount of the gross margin varied from 15 cents to 35 cents. Did you personally participate in the determinations of those gross margins from time to time?

A Yes, sir, I did.

Q Will you tell us what was the general principle or approach that was applied in setting those gross margins?

A There was one basic principle that applied to the gross margins at any point, and that was the business principle of endeavoring to get as much projected gross margin at that point as we possibly could and still hold on to the business.

Q In other words, a good Adam Smith objective in making all you could?

A Yes, sir; and still hold the business.

MR. HAYS:

I am going to move to strike part of that answer as not responsive, because he said "still hold the business." That is not responsive to the question. This question is directed to the setting of the margins on the new business.

HEARING EXAMINER LIPSCOMB:

Granted.

Q Mr. Berry, going back to Topco and CROG, with which you established the relationship in the middle of 1956, did the [1040] gross margins then established for the plants out of which those customers were being served remain the same thereafter during the complaint period?

A No, sir.

Q They were changed from time to time?

A Yes, sir, they were.

Q Not simply when you took on a new customer, but from time to time as to old business; is that right?

A That's correct. It is our practice to review the costs and margins periodically. We review them in the light of the previous six months experience. We take into consideration and project the known factors that will apply, or we think will apply, in the future, and we then adjust the margin in accordance.

Q Will you now tell us again, Mr. Berry, what was the general business principle that you applied in setting those gross margins, and I ask you to give an answer applicable both as to proposed new business and as to business you already had.

A The general basic principle was to establish a gross margin that was as much as we possibly could get, and as we reviewed **t h o s e** gross margins from time to time, to make them as much as we could get and still hold on to the business at the time we changed the margin.

Q Mr. Berry, would you tell us in a little more detail the **[1041]** particular considerations or factors that you had to take into account during the complaint period in determining the amounts of those gross margins?

A It is a rather complicated subject. There are a number of factors that I considered from a business judgment standpoint. One of the factors was the location throughout the United States of the various plants by various companies that packed case goods of evaporated milk, and it was a fact that for any area, or any given area, of the country **t h e r e** were in existence plants that could readily and easily and economically serve those particular areas. Another factor that had a very definite bearing on the decisions that I made was the experience that we had had in the period of

well nigh over 20 years with the Safeway Company in packing the Cherub brand, and the rather disappointing experience I had had in the previous year and a half in losing some 230,000 odd cases of Safeway business at various points in connection with the formula FOB plant pricing that was in existence.

Q And with a gross margin of approximately how much?

A 20 to 28 cents. 28 cents was the highest gross margin we had on any Safeway business.

Q What about information as to competitors' prices? Did that enter into your thinking?

A Naturally it had to enter in, but the information that we had in connection with competitors' pricing was pretty vague [1042] in nature. By that, I mean that there were two methods of selling. One was the FOB plant method that we used. The other method was selling on a delivered basis. That may seem strange, but the FOB plant method, or our system, is a method that other people can estimate and determine and come up with what the price is for any given customer at any given location, much easier than can be done in connection with a delivered price. In addition, the so-called delivered prices were quoted prices. These were prices that supposedly existed but were changed from time to time at different seasons in the year, in accordance with the circumstances and the need to move milk, and in accordance with the inventory position, and factors like that. So that these quoted prices changed.

They had discounts, such as cash discount, label allowances, and the freight, of course, was included in there. It is a fact that the formula or the factors that

go into our pricing formula, everyone knows what they are, and the only variable is the difference from one month to the next in the cost of milk.

Q Raw milk?

A Raw milk supplied. In any location a person could estimate what that milk would cost and come very close, and by adding the freight to any given market, they would know exactly what a customer was paying on our formula.

Q Did you have any business policy as to whether you would [1043] or would not endeavor to direct yourself to a particular price that you thought might have been offered by a competitor in a particular location for a particular transaction?

A We couldn't do that, Mr. Lukingbeal, because under our arrangement, when we establish a C.O.T.M. and hauling charge, this by agreement exists until a future date, when we review the costs and our experience. So that periodically, we will say a couple of times a year, we will review that, and if it were necessary, we would change it. But in the meantime, for a period of six months or eight months, or whatever it happened to be, those factors that made up our pricing formula remained the same, with the exception of the milk price, with a little variation from one month to the next. So that we could not adjust that formula to take into consideration any special price that we heard of for a customer in a particular area. If we did so, then that meant that we would, one, have to change the price for all other customers served out of that plant, irrespective of where they were located, and, two, it would mean that we were jumping our C.O.T.M. up and down, backwards and forwards, in accordance

with whatever we found out at the time, and we couldn't operate it that way.

Q Why not?

A Well, first, the experience we had with it over a period of years was that you determine these factors in advance, you apply them, and they remain constant until such time as a [1044] review shows that they should be changed. In addition to that, our policy and our long-range thinking was that we wished to deal as we had with Safeway, and to handle for customers on a long-term basis. We were not interested in spot orders, or orders that would come in this week and then not again for several months. This in and out basis is not conducive with, nor does it fit into, our production, planning and scheduling. If you can estimate your sales and your sales requirements, coordinate those with your plant production, you are in a much better position to control your inventories and to have some steady flow that you could count on rather than to deal in terms of an order that just comes suddenly and then you never see the customer again. So that the system we established, by virtue of our experience, fitted in with that long-range operation and planning.

Q Mr. Berry, you mentioned a moment ago that if you changed the price to one customer being served out of a particular plant, you would have to change it to all customers being served out of that plant. I take it it is implicit in that statement that although the C.O.T.M., and sometimes the profit margin included in that C.O.T.M., did change, nevertheless throughout the complaint period all customers were being served at a given plant, at a given time, at the same FOB price; is that correct?

A Yes, sir. When we reviewed the cost and made a change in [1045] the C.O.T.M., or hauling at a particular plant, we notified every customer served out of that plant that effective a given date the change would apply on every case for every customer.

Q So that, without knowing that a particular competitive situation prevailed throughout the whole range of the customers being served out of that plant, you wouldn't want to change the price because of some information about a particular customer; is that right?

A No, sir, we wouldn't, didn't, and couldn't, because to change it for just one might have affected or would have affected other customers served out of that plant. Again, I say we would have to make the same change at that plant for every customer that came out of that plant. So we couldn't adapt or meet unusual prices that we heard about for a particular location or customer. Aside from that, there was this element, that a number of our customers were customers that we served from a number of different plants. Although we served them from a number of different plants, each and every plant was part of the whole and part of this over-all production and planning, and we had to think in terms of the over-all business of the customer. In other words, you could not take one particular plant over your pricing at another plant to adapt to a local condition. You had to think of it in terms of [1046] the over-all business of those customers that were served from a lot of different plants.

* * * *

Q Incidentally, Mr. Berry, at any given one of your manufacturing plants, was there any difference in the evaporated milk that went into a can that ultimately got a Borden label on it from the can that ultimately got a private label on it?

A No, sir.

* * * *

Q I think it has been implicit in what you have been saying that aside from the variation in the amount of the gross margin, there were also differences from plant to plant and time to time in the costs that went into the production of the private label milk; is that correct?

A Yes, sir, there were.

Q Was there during the complaint period any particular relationship between the amount of the gross margin and the general level of plant costs?

A Yes, sir. As I have indicated, the costs at different plant locations vary. They are not all necessarily the same, and are not the same. Just a little illustration is, if you produce your cans at a particular plant and have to ship those cans to another plant, you get a freight factor. So that the cans cost more at one plant than they do at another. The specific answer to your question is that in general, where we had lower cost plants, we could and did put in higher gross margins than we put in and used at plants where the costs were higher.

Q Just because the higher the aggregate price the customer got, the more problem you had, generally speaking?

A Yes.

Q In talking about these various factors that were taken into account in determining the amounts of the gross margins, you spoke I believe usually in the first person. Did you consult others about those matters?

A Yes, sir, but the procedure was that the cost department would provide us, provide me, with the study and the figures of our costs over a period of the previous six months, and then I would get from various people in the company their best estimate of the factors that would apply for the next six or eight months, and in taking the costs and the estimated future factors into consideration, it would then be up to me to determine change, if any, was needed in the C.O.T.M. and hauling, and when I made those determinations, then I would [1048] consult with the superiors on the basis of the fact that I had made a recommendation and they would okay it or not okay it.

Q During that process did you consult with the managers of the various production plants out in the field?

A No, sir.

Q Why not?

A They had nothing to do with it. The manager of a production plant is simply there to produce the goods. He has no function as regards the determination of price or who you do business with, or anything else. That is not his job.

Q Did you consult with anybody in the Borden Company outside the central office in New York with respect to these pricing problems?

A No, sir. All the determinations on pricing are made in headquarters. They are not made in consultation with people outside.

Q Is that because you think they wouldn't know anything about it, or what?

A I don't know how much they would know about it, but the fact remains that in an organization you have certain responsibilities and functions, and the function of pricing and determination of pricing rests with the main office for all branches throughout the country and is one of the responsibilities and functions that is held only at headquarters.

[1049] Q Let's talk just briefly about the system of billing the private label customers. Would you tell us first about the system that you used with the general run of the customers?

A Yes, sir. As I have indicated before, at any plant location for any month most of the factors that made up the pricing formula were fixed and constant until they were reviewed and changed. The one element that did change from one month to the next, and that would change from the first half of the month to the last half of the month, was the cost of the milk that went into the case. So that during the month in which shipments were made, other than estimating the cost of that milk you would not know the specific cost, and you would not know the specific cost until those costs had been determined by the cost department, which was some time during the following month. This simply meant that to actually bill any customer from that plant location, you had to wait until the true costs were known, and that was some place around the 20th of the following month, at which time the invoice was made up and mailed to the customer.

[1051] Q I believe you had a somewhat different billing procedure with respect to Safeway. Would you tell us about that?

A Yes, sir. The Safeway procedure was that Safeway wished us to bill them at a price determined by them at the time the shipment was made. They would use this price in allocating the cost of that shipment to their particular stores. Safeway would pay us on that invoice, taking a two per cent cash discount, and then when the total shipment and the actual cost of that milk was known for the plant in question, we would make up a statement, showing the amount that they had paid, the freight, if any, involved for their account, the actual cost of the case goods at that plant for that month, and the differences between the true cost or actual cost and the amount that they had paid upon receipt of the bill, and that difference would then be a credit to Safeway. So that in the end, the payment by Safeway was the same as everyone else, except this accounting statement, which is the way they wanted it handled.

Q What happened to that two-percent discount in the course of all that procedure?

A Actually, it just disappeared, because if they took two percent on an invoice at the time and then received back **[1052]** in credit the difference between whatever they paid and the actual cost, the two percent was immaterial. But this was the way they wanted it. This was the system they had used in their own accounting, in the charging of their own stores, and I suppose they wanted to show these discounts.

Q Did any purchaser of private label from Borden

during the complaint period receive any offer of any discount for cash?

A No, sir.

Q Was any such discount granted to any private label customer?

A No, sir.

Q I suppose at some point, then, you and Safeway actually would settle up in respect of the accumulated credits; is that right?

A Yes, sir. The custom at Safeway was that we would provide them with a statement for each month for all shipments at all plant locations, and then that statement would give them a chance to check the freight allocations and everything else. Whenever three months had passed, we sent them a check equal to the differences as added up for the three months in question.

Q What about CROG? Was that billing system like Safeway's?

A It was a very similar system. It was a little bit less detailed, but it was very similar, in that CROG wished to [1053] charge their own members, member warehouses, at a fixed rate, from one month to the next, for the milk that they received.

Q Do you know what that rate was?

A Yes, sir. It was \$5.70 a case. And Consequently, in a similar fashion to Safeway, we billed CROG at this rate. The difference between that and the true cost, in the same fashion as Safeway, was accrued, or did accrue, to CROG as a credit, and at the end of each month we furnished them with a statement of what these differences were.

* * * *

【1055】 Q Going back to the time when Borden commenced packing private label evaporated milk for CROG and Topco, I believe you said that those two customers had come to you and requested service because producer's creamery had ceased to pack evaporated milk; is that correct?

A Yes, sir. They may have had other reasons, but that was the reason they quoted.

Q But they came to you; you did not seek them out. Is that right?

A No, sir.

Q What about the other private label customers served by Borden during the complaint period, the names of which are shown in the record? Did Borden, or anyone on behalf of **【1056】** Borden, solicit any of that business?

A No, sir.

Q Did Borden, or anyone on behalf of Borden, solicit any private label evaporated milk business during the complaint period?

A No, sir.

Q All of that business came by way of requests from the customers; is that right?

A That's correct.

Q Was there any occasion during the complaint period when a request for service was received and Borden did not pack private label evaporated milk for the person or firm?

A I answer the question this way, that we honored requests received, so long as we were physically able to provide the necessary milk, and if we had the necessary production. When we reached the point where we could not satisfy any further business out of any

plant location on a year-round basis, then we said no that we are sorry, we can't take it on.

[1057] Q Did you at any time during the complaint period reach that point at any of the plants?

A Yes, sir.

Q Did you at any time during the complaint period fail or refuse to meet any request for the packing of private label on the ground that the prospective customer's volume was too small?

A No, sir; never.

Q Did you at any time during the complaint period fail or refuse to meet any request for packing of private label evaporated milk because of the prospective customer's potential volume was too large?

A Yes, sir. In connection with Topco, when they asked us to take on their business, pack their requirements, one of their customers was located in Los Angeles. We told them that we were not able to service their customer out of the Modesto plant. We weren't able to do it. We just didn't have any leeway, and we told them we couldn't take that.

Q In a case, Mr. Berry, where at the time you received a request for service you were unable to comply with, but then later out of that plant you had more supplies available, did you go back and inform that prospective customer of that change in circumstances?

A If at a later date the circumstances changed and we could honor and account that we had already turned down, we **[1058]** did inform the people that the circumstances had changed, and if they were still interested, all right, and if they were not, why, it was up to them.

* * * *

[1059] Q I show you a document marked Respondent's Exhibit 17 for Identification. The document bears the heading "Private Label Evaporated Milk Business Lost by the Borden Company, January 1, 1956-March 31, 1958." Can you tell us what this is?

A It is a list of consignees or accounts for which we had packed private label evaporated milk that on the dates indicated in the last column ceased dealing with us and went to some other source.

* * * *

[1061] Q Mr. Berry, do you know whether the accounts there listed continued to handle private label evaporated milk after the dates that they ceased to order from Borden?

A Yes, I do.

Q How do you know that?

A I know it from two sources. One, we have salesmen calling on these stores. They saw the private label handled by those stores in sale thereafter, and from time to time I, myself, have travelled and visited stores, and some of those stores I personally went into.

* * * *

[1080] Q Let's look at page 1055 of the transcript of yesterday's hearing. In line 20 I asked you the question, "But they came to you; you did not seek them out; is that right?" Your answer was, "No, sir." Is that a right answer?

A Perhaps I didn't express it very clearly. What I meant by the answer was that the customers came

to us and asked us to handle for them. We did not go to them and seek them out.

Q Mr. Berry, I show you page 968 of the transcript. I think that the question, beginning on line 14, and the answer thereto, beginning on line 16, may have a somewhat similar confusion in them.

A Fourteen?

Q Let me attempt to clarify it, Mr. Berry, by asking you this question. In carrying out your stock rotation program, did you or did you not find occasions when, in order to move the older supplies, you had to ship from a location which was not the most economical one freight-wise?

A My answer is that that did happen and that there were occasions when we had to ship under such conditions.

* * * *

[1083] Q Mr. Berry, when Borden sold Borden brand evaporated milk to its customers, will you tell us whether Borden placed any restrictions on the use of the Borden name which those customers might make of the Borden name in connection with that merchandise?

A No, sir, there were no restrictions placed on the use of [1084] the Borden name in connection with the sale of the retailing by those customers of Borden brand evaporated milk. As a matter of fact, it was to their advantage and ours that they promote and advertise using the Borden name. There were no restrictions, so long as the Borden name was not used in any derogatory manner.

Q Did any such instance ever come up during the complaint period?

A I never heard of one.

Q Mr. Berry, you were telling us yesterday about the kind of sales pitch that the Borden jobbing salesmen made to the wholesale trade in respect of Borden brand evaporated milk. What, if anything, did they tell the wholesale trade as to the usefulness of that Borden name to the wholesaler?

A The wholesalers function is to provide complete and adequate service as far as grocery merchandise is concerned to the retail trade to which he sells. If the retail trade depends upon consumers who want certain merchandise and certain brand names, such as the Borden brand evaporated milk, then the wholesaler is losing business or is not performing his function if he does not carry it. The importance to the consumer, to the retail trade and to the wholesale trade of the Borden brand is well known by everybody. It is a fact there are more food packages sold annually under the Borden name than any other single brand name in the world.

* * * *

[1086] Q There has been reference from time to time in this proceeding, in testimony both of witnesses called by counsel in support of the complaint and by witnesses for respondent, to the advertised brands of evaporated milk as including Borden, Pet and Carnation. Do you know whether in fact that Cherub brand was advertised in newspapers or any other media?

A Yes, sir, I do. The Cherub brand, as I have stat-

ed, is a brand of the Safeway stores, and Safeway stores, in running their weekly food ads from time to time mention many of the products that they carry in their stores, including Cherub brand, in their food ads.

Q Will you tell us what is meant by the apparently generally accepted proposition in the industry that the Borden, Pet and Carnation are advertised brands and others are not?

A It is a general categorizing, in that the Borden, Pet and Carnation, and actually there are a few more, local brands that are owned by Pet and Carnation, and there is one other brand known as the Wilson brand, all of which are in competition and sell at the same price, it is a generally accepted fact that in referring to those as the advertised brands, a person means that these brands over a long period of time have been promoted, merchandised and advertised heavily by the companies that own them, using the generally accepted media for advertising be it magazines, radio, newspapers, television, et cetera. There are brand names that have been promoted over [1087] a long period of time.

Q Would you say that the Cherub brand is different in that respect?

A Yes, the Cherub brand is a brand that I would refer to as a controlled brand, in that it is sold only in Safeway-operated stores. It is not available outside of those stores. Therefore, it is not an advertised brand in the same sense as a national brand, but it is advertised by the Safeway people themselves in their food

ads, in that they are trying to promote the sale of Cherub.

* * * *

[1090] HEARING EXAMINER LIPSCOMB:

Read it back if you will. (Question read as follows:

"Q. Directing yourself to the time when Borden first commenced to pack private **[1091]** label evaporated milk for Community Cash under this then-new label in the market, do you have any view as to whether Safeway's Cherub label had any greater or any lesser consumer acceptance than did this Sunny Day label?)

A Yes, sir. My view is that is most logical that the Cherub label, which has been marketed for many years, and as I have testified has been mentioned on many occasions in Safeway's newspaper ads, was to consumers a better-known and better accepted label than in this instance the Sunny Day label, which for the first time was placed on a can of evaporated milk.

* * * *

[1093] Q Directing yourself to the time that Borden commenced to pack the Shurfine evaporated milk for CROG and the Food Club evaporated milk for Topco, do you have any view as to whether those trade names or labels had any degree of consumer accept-

ance over and above that of a new or unknown label in the market?

* * * *

A Yes, sir, I do have a view. My answer would be substantially the same as the answer I gave in connection with the Cherub label, namely, that both the Food Club brand and the Shurfine brand have been marketed for considerable periods of time through certain groups of stores, and having been marketed in that fashion and promoted in that fashion, the [1094] mark would be better known and more accepted by the consumer than a completely new and unknown label that came along.

* * * *

[1095] Q I think your testimony is clear, but I want to be sure about it. Did Borden spend any money in any way in advertising any of these private label evaporated milks?

A No, sir, we did not.

[1096] Q You didn't furnish any money to anybody else to use for that purpose?

A No, we did not.

Q Did any of those private labels have on any coupons redeemable by Borden?

A No, sir. Not redeemable by Borden, no, sir.

* * * *

Q You testified that during the year 1957 you personally had no duties or responsibilities in the Borden Company other than in regard to Borden brand evaporated milk and private label evaporated milk. Directing your attention first to the Borden brand evaporated milk, would you tell us, Mr. Berry, how you spent your time in the year 1957?

A There were a great many things that occupied my attention and went back to my responsibilities in connection with Borden brand evaporated milk. I was responsible for any changes or improvements on the labels and the cartons; I was responsible for all of the sales estimates by months and the revisions of those as time went on; I was responsible [1097] for coordinating those sales estimates with the production department; I was responsible for preparing and administering, pricing, preparing promotional budgets; I was responsible for the preparation of all point of sale consumer materials; I was responsible for the handling of all direct consumer complaints and the working out of those with the quality control department so that we could hold at all times to a minimum such complaints; I was responsible for the administration of Borden's activities in the premium coupon plan, and for attending the meetings that were held from time to time by the various cooperators in that plan, and for passing on the promotional activities in behalf of the Red Scissors Coupon Plan; I was responsible for preparing for the annual sales meetings all of the data and the presentation that would be made by me to the field personnel; and I was responsible for a sufficient amount of traveling and investigation in the market to enable me to keep abreast of market

conditions and developments to the end that I could do a better job for the company on promoting Borden brand evaporated milk.

* * * *

[1099] Q Will you direct yourself to the private label evaporated milk situation in the year 1957 and tell us what you did in that regard?

A Once the arrangement to pack a private label brand was set up, from that point on it became a matter of routine. The orders were upon instructions sent in to the sales service department, and in turn sent up to the production department for allocation. That occurred daily. Actually, they did not flow from me. Aside from an occasional telephone call or an occasional letter, or something of that nature, that arose in connection with a question about a shipment or something of a routine nature, there was very little time that I actually devoted to it, after the initial arrangement was set up.

* * * *

Q Mr. Berry, when you were out on these trips to the **[1100]** field, if you happened to run into one of these private label customers, you would shake hands with him, wouldn't you?

A Yes, sir.

Q Certainly you had some contacts with these private label customers beyond just a phone call now and then, didn't you?

A Yes, sir. For example, both Biddle and Topco

and CROG are located in Chicago. If I attended an evaporated milk association meeting in Chicago or visited our Chicago office for any reason and had a few hours available, I usually called them up, had lunch with them, or dropped by and said hello and chatted. Obviously I didn't avoid them. By the same token, if I traveled to the west coast, when I was in San Francisco I made it a point to stop by the Hanford office at Oakland.

* * * *

【1105】 CROSS EXAMINATION:

By Mr. Hays:

* * * *

【1111】 Q Does the Hanford Milk Company have codes on the bottom of its cans, just like Borden Company does?

【1112】 A You mean the milk they produce at the Hanford plant?

Q Yes, sir.

A I believe they do, Mr. Hays.

Q Does the Carnation Company have codes on the bottom of its cans?

A Yes, sir.

Q Does the Pet Company have codes on the bottom of its cans?

A Yes, sir.

Q Can you look at a can and tell whether or not it is a Carnation or Pet or Hanford code?

A I can tell generally whether it is a Pet or Carnation code. I can't read the codes.

Q But you know what company it is for?

A I know about which way the codes run.

Q Haven't you testified that your salesmen, in the course of their duties, it is their duty to go in and look at the cans on the bottom of the milk on the store shelves to see that the oldest milk is moving?

A Yes.

Q Can't they also pick up a can, other cans of milk, and look at the code and see what company produced it?

A They can pick up the can of milk and look at the code; as to whether or not that particular salesman would know whose code it was, I couldn't answer it.

[1113] Q But they could relay what that code was to you and you would know, wouldn't you?

A I would know better if I saw it myself, rather than have a code read off.

Q With reference to the salesmen located in the areas you lost this business, what instructions did you give them to determine the codes of the Cherub brand, the Safeway brand, of milk on the shelves in those areas?

A I don't remember giving direct to any salesman any instructions. It was not my position to do so. I requested through the sales department that they check the stores and determine what the situation was, and then I, myself, upon occasion, in my travels, as I indicated, in visiting these stores would pick up the cans and look at them.

Q Did you look at the cans in these areas?

A I looked at the c a n s in the El Paso and New Mexico areas.

Q In how many stores?

A Mr. Hays, I wouldn't recall. I have spent considerable time in these markets. If I spent three or four days in New Mexico and El Paso, I would probably get into 30 or 40 grocery stores during that period. I just don't remember.

Q Did you look at the codes when you went into those stores?

A Are you speaking about Safeway stores or all stores?

[1114] Q Safeway stores.

A I looked at the codes in some of them.

Q For what purpose?

A To determine whose can it was and to try to satisfy my own mind as to who possibly had the business.

Q You did this in El Paso; is that right?

A El Paso and New Mexico, because S a f e w a y Stores in New Mexico are served out of the El Paso warehouse.

Q Where in New Mexico?

A All over the state. In other words, the Safeway stores throughout New Mexico are served out of El Paso.

Q What did those codes show?

A They showed that in my opinion they were a Pet can and a Pet code.

Q You testified that the only plants in Texas and Colorado and Utah, and in effect areas they could serve most efficiently, were Pet and Carnation. Do you mean to imply

there that Carnation, in your opinion, got some of that El Paso and New Mexico business?

A No, sir, I didn't say that. I said that the New Mexico stores of Safeway are all served out of the Safeway warehouse at El Paso; and in checking those stores, if you checked a Safeway store in El Paso, or if you checked any Safeway store in New Mexico, its source of supply had to be the El Paso warehouse. So that whatever can I found in any of [1115] those stores, if it was a Pet can, which in my opinion it was, then my conclusion was that that particular area was being served by Pet.

* * * *

[1116] Q Did you check the codes on the cans in the Safeway stores in the Seattle-Spokane area after you lost the business?

A Yes. Upon a visit at one time to Seattle, I picked a can up and found that it was a Carnation-type can.

* * * *

[1118] Q Did you make any effort to determine what was the price for the milk which was paid by Safeway on that milk that was lost, wherever they were taking it on after they ceased to buy from Borden?

A I would imagine that you would call it making an effort, because when I visited the west coast in the course of my travels in business, and when I went to San Francisco, I generally stopped in and paid a visit

to the Hanford people, and naturally during the course of conversations I made some effort to try to get this business back. I remember making a statement to them to the effect, "Well, I suppose we lost the business because our price was too high," and they indicated that that was true, that they could buy cheaper than what they were buying it for from us. But they did not tell me specifically how much or what the price was.

* * * *

[1124] Q With reference to Mount Vernon, Washington, did you make any determination or any examination of the cans on the shelves of the Safeway stores in that area to determine who was supplying them?

A I remember going into Safeway Stores in Seattle and picking up cans and looking at them and seeing that they were Carnation cans, Carnation-type cans. There are two plants in Mount Vernon, Washington. One is Carnation and the other one is Consolidated.

Q Did you make any similar examination of the cans in Billings, Butte, Denver, Grand Junction, Pueblo and Phoenix?

A You mean particularly in connection with having lost this business?

Q Yes, sir.

A Mr. Hays, I don't recall doing so in Butte and Billings, because I believe that the last time I was in Butte and Billings was prior to this period; in Salt Lake and Denver, which I have visited frequently, I did check from time to time as I visited the stores, yes,

sir. Grand Junction I have never been [1125] in, to the best of my knowledge.

Q Where you made those examinations, what did you find?

A Mr. Hays, I don't know whether I could peg down the specific city with the can, but I can tell you that they were either Carnation cans or Pet cans. In connection with Salt Lake, my best recollection is that it was a Pet Can.

Q You stated that the one possibility in El Paso was the Page Milk Company. Did the fact that you looked at the cans in El Paso and New Mexico indicate some other company and dispel the possibility that the Page Milk Company had gotten that business?

A If I can recall my testimony correctly, I said that from the location of the plants, the only possibilities could have been Carnation, Page or Pet. I did not state that the examination I made indicated that it was a Page can.

Q On the basis of your examination, in addition to the location of the plants, is it your opinion that the Page Milk Company got any of that El Paso business?

A I believe I have already testified that my examination showed me that it was a Pet can.

Q Where you made the examinations?

A Yes.

Q So you no longer consider that the Page Milk Company got any of that business?

A At that particular time, at the time of my examination, [1126] to my knowledge, it was a Pet can, and I did not then feel that Page had that business at that time. What happened since, I don't know.

* * * *

[1127] Q Distinguish the gross margin from the projected gross margin, what during the complaint period was the plant with the highest gross margin?

A It would have been Lewisburg, Chester, or possibly Wellsboro. I just don't recall.

Q In other words, those three plants had the highest gross margins during this period, is that right?

A They had the highest projected gross margins, to the best of my recollection.

Q Did they have the highest gross margins?

A I couldn't answer that question.

Q You noted that the range in connection with projected gross margins was up to 35 cents a case. Can you give us a range with reference to the actual gross margins?

A I don't recall specifically, Mr. Hays, because you must remember that upon review periodically of these C.O.T.M. **[1128]** factors, we took into consideration the figures on our actual operation for a time past, and as I have indicated, the anticipated factors that would come in the future; and when the margin, the anticipated gross margin, did not or had not worked out to the amount that we thought it should have, we changed the C.O.T.M. and moved it up. In other words, there is a difference between our projected gross margin and what would actually be true, just as there is a difference between an estimated sale and an actual sale. You can use your business judgment and that is all you can do.

* * * *

[1131] Q Am I correct in stating that the name of this company you referred to yesterday that dealt with the Red Scissors plan was Premium Associates, Inc.?

A Premium Associates, Inc.

Q Is that a corporation?

A Yes, sir.

Q How long has it been in existence?

A As a corporation?

Q Yes, sir.

A Mr. Hays, I couldn't tell you the date. As a corporation, it has been in existence for four or five years. Prior to that, it was not a corporation.

Q What was it prior to that?

A Prior to that, for many years, this premium plan, the operation of it as I described before, was handled by the premium department of the Colgate-Palmolive Soap Company.

Q At the present time, I believe you stated, the Borden Company holds 25 per cent of the stock in that company.

A Yes, sir.

Q Who are the other stockholders in that company?

A The other stockholders are the Colgate Company; the William B. Reilly Company of New Orleans; and the Philbert Margarine Company of Baltimore, Mrs. Philbert's Margarine. I believe the company's name is Mrs. Philbert.

* * * *

[1168] Q During the period of January 1, 1956 to March 31, 1958, did the full line salesman sell all of these products throughout the United States, or were

there some salesmen who did not sell some of these products, such as Mince Meat and Starlac?

A The 200-plus full line salesmen of the Borden foods division sold all of the products in the Borden foods division throughout the United States. However, I know you recognize that the distribution of some of these products would vary, perhaps, from territory to territory.

* * * *

[1181] By Mr. Hays:

Q I believe somewhere along the line, either yesterday or this morning, you testified with reference to the expense of the private label operation. I believe that your general statement was that after the program was in operation, it was less expensive to run. Is that correct?

A I don't remember making any statement about the degree of expense after the program was in operation. I recall making the statement that after the arrangement to pack, a given label was set up, the time spent, and from that point on it was pretty much a routine.

Q There was more expense during the period when the arrangements were going on, isn't that correct? Let me withdraw that.

Isn't there an expense in connection with a setting up of the private label operation as distinguished from the expense or cost while the operation is actually in being?

A The only expense I would know of, Mr. Hays, would be the time that it took me to set it up, whatever

portion of my time it took, assuming that time had a value.

Q There is the element of production planning, is there not?

A Yes, sir.

Q Sometimes t h e r e is an expense in connection with production planning, isn't there, or wasn't there?

[1182] A My understanding of the words "production planning" is the determination of the receipts and the number of cases that are going to be produced, which is a matter of receiving the information and putting it down on paper from the standpoint of production of cases or tabulating it. I don't know of an expense in connection with production planning.

Q During the period January 1, 1956 to March 31, 1958, or even immediately prior to January 1, 1956, wasn't there some expense incurred in connection with analyzing the evaporated milk production facilities and methods of sale?

A I am not sure that I can answer the question, Mr. Hays. I spent time in connection with estimating sales on Borden Brand Evaporated Milk, the production department spent time in tabulating and keeping track of production and receipts of milk. As to what particular expenses come into this or apply, I am not certain that I can tell you.

* * * *

[1184] Q You were asked at Page 959, the question: "There were well-established Borden products on the market, is that right?" Your answer was, "That is correct." What is a well-established product, or

what were the well-established products you were referring to?

A At what time were we talking about, Mr. Hays.

Q I think you were referring to 1936.

* * * *

[1185] Q What were the well-established products on the market at that time?

A Borden's fluid milk; Borden's ice-cream; Borden's complete line of cheeses; Borden's evaporated milk; Borden's Non-such Mince Meat; Borden's Eagle Brand sweetened condensed milk; Borden's Starlac — no, I will take that back. Strike that out. Borden's Malted Milk; Borden's Caramels. Then we can go further afield into the institutional end. A great many Borden products were sold to the bakery trade, for example. If you get over to the export division, Borden's Klim, which was exported, was a well-established product.

Q Was one of the factors which in your mind contributed to the fact that these products were well established the wide consumer acceptance of these products?

A When I say well-established, Mr. Hays, I carry with it in my own mind the fact that in order to become well-established, a product has been on the market for a period of time, has been widely promoted and advertised, and as a result of all the process of building it up, is an accepted and established product and has consumer acceptance and demand.

[1186] Q During the period January 1, 1956 to

March 31, 1958, was the Cherub brand canned evaporated milk well established.

A The correct answer would be in accordance with what we mean by well-established. I will answer your question this way to eliminate any relative aspect, that I would say that the Cherub brand was a brand that had been on the market, had been marketed by the Safeway Company and was accepted by consumers, at least that segment of consumers who normally and regularly purchased and traded at Safeway stores in preference to dealing with independent or maybe other chains. In other words, Safeway-type customers, people who regularly shop in Safeway, would have more knowledge of that particular brand Cherub than would a person, we will say, who customarily deals with another chain or with an independent and very rarely goes into Safeway stores.

Q It has consumer acceptance, then?

A Yes, sir. It did have some consumer acceptance.

Q In your packaging of private label evaporated milk under another brand, does it make any difference to you whether that brand has consumer acceptance?

A Are you referring to any brand, whatever the brand may be?

Q Yes, sir.

A No, sir. It is no concern of mine.

Q That would not be a factor in your considerations as [1187] to whether or not you would want to pack that brand?

A No, sir, I wouldn't say it was.

Q If the brand has consumer acceptance, isn't it

reasonable that you will continue to sell that product in the future over a long period of time?

A By "you," you mean the Borden Company?

Q Yes.

A It doesn't necessarily follow. The product may be in existence, but it doesn't necessarily follow that the Borden Company will still be packing it.

* * * *

[1199] Q In connection with the distribution of the canned evaporated milk during the complaint period from your various plants to ultimate purchasers, you testified with reference to plant storage. With references to plant storage, and with reference to Borden brand evaporated milk, during the complaint period did all of the Borden brand evaporated milk go through plant storage facilities?

A You mean immediately from the production line did it go through and then to some place else?

Q Yes.

A Not all of it, no, sir.

* * * *

[1200] Q During the complaint period did all of the Borden brand canned evaporated milk go through a reserve storage warehouse?

A Not all of it, no.

* * * *

【1201】 Q During the complaint period, how many reserve storage warehouses did the Borden Company have?

A There were about fifteen.

Q Where were they located?

A In general, Mr. Hays, they were located someplace between the particular plant and t h e area in which we eventually expected to sell the milk; in other words, someplace along that route or line in between.

Q Were those reserve storage warehouses owned by the Borden Company?

A No, sir, they were not.

Q You do not know the geographic location that they were in during the complaint period?

A Not specifically, because t h e y would change from year to year. For example, if we used one in one particular year, when we came to contract for it the next year, maybe that space was not available. So that from time to time the locations changed in accordance with what was available at the time.

Q Were they normally located in the same city in which the plant was located?

A No, sir. That might have been true upon occasion, but I would say in most instances they were on the way to the market in which we eventually hoped to sell the milk.

Q What were the factors that went into the determination **【1202】** as to how far from the plant these plant storage warehouses would be located, if any?

MR. LUKINGBEAL:

Mr. Hays, do you really mean plant storage warehouses in that question?

MR. HAYS:

Reserve storage warehouses. Thank you.

THE WITNESS:

I would say the main factors, Mr. Hays, were, one, the first and most important, where you could get the plant reserve storage; in other words, where there was one available for the space that you needed; and secondly, where you could get an in-transit freight rate from your plant through that storage facility on to the market in which you eventually expected to sell the milk.

Q By an in-transit freight rate, I assume that you mean that they would get the same rate from the point of origin to the point of ultimate destination, with or without regard as to whether there was a stopover in a particular city on the way?

A That is generally what that means.

* * * *

[1203] Q In your direct testimony you referred to reserve warehouses. During the complaint period, did all of the Borden brand evaporated milk pass through reserve warehouses?

A By reserve, you meant the reserve or the outside cold-storage warehouses? I just want to be sure we are talking about the same group of warehouses.

Q The fifteen warehouses that you referred to.

A All of the Borden brand did not go through them.

Q You referred to another storage facility category as a consignment warehouse.

A Yes.

Q I take it that did not have cold storage facilities.

A No, sir. They were just regular public warehouses.

Q During the complaint period, did all of the Borden brand milk pass through consignment warehouses?

A No, sir, not all.

Q During the complaint period, did all of the Borden brand milk t h a t passed through reserve warehouses also pass through [1204] consignment warehouses?

A No, sir, not all of it.

Q During the complaint period, did all of the Borden brand evaporated milk that passed through consignment warehouses also pass through reserve warehouses?

A No, sir.

* * * *

Q During the complaint period, what was the period of time between price increase announcements and the effective date of the price increases?

MR. LUKINGBEAL:

May I inquire whether you are asking that with reference to the Borden brand evaporated milk?

MR. HAYS:

Yes.

A When you say the price increase announcement and the effective date of the increase, the word "announcement" implies to me that you have announced

in publication. I can answer your question in this fashion, that in notifying the trade, this was the job of the field force to cover the trade and tell them that the price was going up. I would say there would be variations in that anywhere from a day to two or three days, maybe.

Q Is it your testimony that it was heavy buying during this two or three day period?

A Yes, sir.

* * * *

[1212] Q You have testified that, in the case of the Borden brand evaporated milk, during the period between the date of the price announcement, price increase, and the effective date of the price increase, which is approximately two or [1213] three days, the buyers increase their purchases during that gap, presumably to take advantage of the lower price; is that correct?

A That is correct.

Q Is that phenomenon, increase in buying during the gap, also present in situations where the private label evaporated milk prices increased?

A I would say to some degree it is, yes, sir.

* * * *

[1219] Q For a company such as Borden Company, how important is the fact that they advertise?

A In connection with any particular product, for the whole company, all the products?

Q All products.

A My personal opinion is that it is absolutely vital. You must advertise. You must advertise heavily over a long period of time to hold your position, to establish your franchise, and to maintain your level.

Q Why is it important?

A Because, after all, the sales of any product go back to the consumer demand. If the consumer demand is not there, then your sales are going to suffer.

* * * *

[1227] Q During the complaint period, on every shipment of private label evaporated milk, was there a brokerage paid by Borden to some broker?

A No, sir.

Q There were shipments, then, where no brokerage was paid; is that correct?

A I believe that is right. There were some areas where there weren't any brokers.

* * * *

[1228] Q During the complaint period, on sales of Borden brand evaporated milk, was brokerage paid on each sale of Borden brand evaporated milk?

A Where a broker existed, yes, sir.

Q Where a broker did not exist, was brokerage paid?

A No, sir.

* * * *

[1254] REDIRECT EXAMINATION

By Mr. Lukingbeal:

* * * *

[1256] Q Mr. Berry, in the case of a shipment of private label **[1257]** evaporated milk to a Safeway warehouse located in the brokerage area of one of your brokers, did the broker receive any commission computed in respect of that shipment?

A No, sir.

Q Your earlier testimony has been to the effect that the two and a half cents per case brokerage commission was computed and paid in respect of those shipments of private label that went into areas where you had a broker, and you have just now mentioned that shipments to Safeway were an exception to that. Was there any other exception?

A I would say sales to the Quartermaster, to the government, the Quartermaster Division, whatever sales existed in that.

* * * *

[1261] EDWARD M. DARCEY was called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

Q Mr. Darcey, will you tell us your business or profession, please?

A I am a certified public accountant.

Q When were you certified?

A In 1949.

Q In what state?

【1262】 A The State of New York.

Q Where did you receive your academic training,
Mr. Darcey?

A The school of business, Fordham University.

Q Do you have a degree from that institution?

A Yes, I do.

Q What degree is it?

A Bachelor of Science in Accounting.

Q When did you receive that degree?

A In 1942.

Q Do you practice your profession with any firm?

A Yes, sir. I am an employee of Haskins and Sells.

Q Where are they located?

A Their New York office is at 2 Broadway, New
York.

Q What business are they engaged in?

A It is a partnership of Certified Public Accountants.

Q Do they have offices elsewhere than in New
York?

A Yes, sir. They have offices in many of the principal cities of the United States, and they have affiliations just about all over the world.

Q Has there over the years been any relationship between Haskins and Sells and the Borden Company?

A Yes, sir. Haskins and Sells has been the auditors of the Borden Company, to my personal knowledge, ever since I have been with Haskins and Sells, and as

I understand, we have been auditors for Borden's many years before that.

[1263] Q How long have you been with Haskins and Sells?

A Seventeen years; since I graduated from Fordham.

Q Have you personally over the years in the course of your work for Haskins and Sells had anything to do with the Borden Company?

A Yes, sir. I have been supervisor of our audit up there since 1953.

Q You mean the annual audit?

A Yes, sir, the regular annual audit that results in the printed annual report, and then the Form 10K filed with the SEC.

Q That has been continuously since 1933?

A Yes, sir.

Q Roughly what proportion of your professional time in those years, beginning in 1953, has been devoted to the affairs of the Borden Company?

A Of course, that varies somewhat with the time of the year, but on the average, for the year as a whole, I would say it is about half.

Q That is, from time to time during the year, during Borden's fiscal year, the proportion of your time required in connection with supervising the Borden Audit work fluctuates; is that right?

A Yes, sir. It is heavy at the end of the year and into January and February. It tends to be a little, much less, during the summer, but it does take some of my time all year round, really.

[1264] Q You say since 1953 you have been the supervisor of the Borden audit. I take it that means

there are other Haskins and Sells' people that help you on that work?

A Yes, sir. In New York, the men are supervised directly by me, and the work done at other offices of the Borden Company are supervised by people in my own position in those areas; but the over-all supervision, you might say, the direction of the whole thing, is here in New York at the company's headquarters.

* * * *

[1271] Q Mr. Darcey, I show you Respondent's Exhibit 73 for identification and ask you to tell me what that is.

A This is my report on the review that was made by Haskins & Sells which I directed, of the company's records relating to sale, production and distribution of Borden brand and private label evaporated milk.

Q Is the study reported therein directed to any particular period of time?

A Yes. To the calendar year 1957.

Q This study I believe you said was made under your supervision.

[1272] A Yes, sir.

Q You had people helping you on it?

A Yes, sir; other employees of Haskins & Sells under my supervision.

Q Approximately when did this work get under way?

A About the end of June, 1959.

Q Can you give us an approximation, Mr. Darcey, as to how many man hours of Haskins and Sells' time went into this project?

A It's over 3,000 hours.

Q Was that report prepared by you, Mr. Darcey?

A Yes, sir.

* * * *

[1273] Q Mr. Darcey, is it your testimony that this report is an accurate summary of the cost analysis that you carried out and of the conclusions that you reached?

A Yes, sir.

* * * *

[1304] OLIVER DOYLE HALL was called as a witness on behalf of the respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

Q Mr. Hall, you are employed by the Borden Company, I believe.

A Yes, sir.

Q What is your present position with Borden?

A Southeastern District Manager of the Borden Foods Company.

Q What was your position in 1957?

A General sales manager of the Borden Food Products Company.

* * * *

[1306] Q How long have you been with the Borden Company, Mr. Hall?

A Since June 15, 1938.

Q Will you outline very briefly what your different positions have been?

A I came with the Borden Company as a retail salesman and served in that capacity until toward the end of 1941, and from 1941 until the latter part of 1945 I served as a wholesale salesman, with a stint in the service. Then I was district manager, district sales manager, until April of 1946. I'm sorry. April of 1947. April of 1947 until January 1, 1952, I was the Eastern Division sales manager, and from 1952, general sales manager.

Q Up until January 1, 1958?

A That's correct.

* * * *

[1308] Q How did you define your responsibilities in 1957 as general sales manager?

A I was responsible for the operation and maintenance of a **[1309]** national field selling organization, whose responsibility it was to handle the distribution and the sale and to carry out the merchandising objectives of the products in the line. Of course, I had all the responsibilities that go along with the maintaining of a large organization — manpower, maintenance, manpower development program, and so forth.

Q Just roughly what did that sales force consist of in 1957?

A We would have averaged about 250 Borden people and 90-odd food brokers.

Q And those 250 were broken down into what general scheme of organization?

A We had full line salesmen and we had supervisors; we had wholesale salesmen in some spots; and we had combination full-line salesmen; we had district managers and division managers, as well as our brokerage wholesale coverage.

Q What was a full line salesman?

A A full line salesman was a man who spent his time mainly in retail stores, merchandising, and selling the full line of products.

* * * *

[1317] Q Would you outline for us just very generally, Mr. Hall, what one of these retail salesmen did on a representative sort of call on a retail store? Let me say, before you answer, that I mean to come back to some of these points in greater detail. I would like you now just to run generally through what a representative call on a retail store consisted of.

A On a regular retail call, before the salesman would go into the store, he would refer to his route book. That's a book that has the history of what went on on the last calls and subsequent calls on that particular store. That gives him a picture of what his problems are, what he is up against, how he is going to plan his call. On entering the store and after identifying himself with the owner or manager, he will go to work on determining exactly what the condition of his products are in the store. Let us say he will take a survey of the shelf, the condition of the stock, the amount of stock; he will check the back room on the products.

It is one of those common sense sort of things. After a salesman made two or three calls on a store, he really starts to work when he starts on the shelves. He will replenish displays and do his [1318] service work, and he will attempt, while he is doing this work, to spot display space, where he might put a display of a product. So that when he approaches the owner or manager to accomplish the objective that might be in his mind as to a display, he has a complete story to give him. He doesn't run into the negatives, such as, "Where am I going to put it?" or "I haven't got room for this thing." He answers the questions. He picks out the hotspots in the store. Then he will go on with the hot merchandising program. He will put in the displays that are permitted. He will place point of sale material, and he will take an order.

* * * *

[1328] Q Wouldn't a store owner ever put up his own store display of the Borden brand evap?

A Seldom, if ever.

* * * *

[1330] Q I take it from what you say that you looked upon this in-store work, such as these floor displays as a means of competing with Pet and Carnation; is that right?

A Very definitely, yes, sir. If you didn't build floor displays, you couldn't compete with them, because those were their tactics.

* * * *

[1331] Q In your competition with Pet and Carnation, do you make any major effort to convince the consumer that the Borden brand evaporated milk has a superior taste than Pet and Carnation?

A No, sir.

Q You do have on the Borden brand evaporated milk the premium coupon, I believe.

[1332] A Yes, sir. What is our principal means of promoting Borden brand evaporated milk.

Q And the Pet and Carnation, I take it, do not have premium coupons?

A No, sir.

Q I have heard some talk about Tote cartons. Can you tell us what that is?

A They are one of the standard merchandising tools that we had to work with on evaporated milk.

Q What did it consist of?

A It consisted of placing loose cans into easy carrier cartons containing either four or six cans of tall size evaporated milk. It is a gimmick that is received very well in stores. It is a large single purchase. It is easy to handle at the check-out counters. The stores like it. It enables us, frankly, to get extra display space, both on the shelf and on the floor. You have to have generally two stacks when you have your tote cartons. So you stack the loose cans up beside the tote cartons and the objective is to get twice as much display space.

Q All on the idea that the more display space, the more you are going to sell?

A Very definitely. The tote cartons also had a merchandising effect. In addition to that, we used it to further **[1333]** push our coupon products, our coupon

idea, rather. We included an extra value coupon, good for several coupons when combined with regular coupon purchases right on the side of the container. The tote carton also enabled us to put extra value certificates in there. So when the consumer made the purchase, she had some extra value coupons to go with her regular coupons, and to get new customers to start using it, we even put catalogues in there from time to time.

Q So that the housewife who bought one of your tote cartons got not only the coupon she would have gotten if she picked up those cans off the shelf, but in addition got some more coupon benefit; is that right?

A Yes, sir, that is correct.

* * * *

[1334] Q Suppose you had one of your retail salesmen working in a retail store and he sees a housewife coming along and she picks up some cans of Carnation Evaporated Milk. What does he do about it?

A Well, he immediately takes action in that case if he wants to stay on the payroll. He takes very vigorous action to attempt to switch the consumer from either Pet or Carnation to the Borden brand. They point out the advantages of the coupon premium plan. He would explain this in detail. This plan lends itself to a person-to-person explanation. He tells about the products and the premiums she can get by saving the coupons. He would certainly go strong on the Borden quality. He would indicate the recipes on the cans. He would give her a starter certificate, telling her that she **[1335]** has ten coupons now, and when she com

bins that with ten of the regular label coupons he would in all probability give her a coupon catalogue to illustrate some of the premiums that she could obtain. He would indicate to her that this product could be used in any way that milk can be used. A good, all-around, hard sell story, with the idea specifically of having Mrs. Consumer put down that can of Pet or Carnation and put the Borden brand in her basket, and with the idea that he as a salesman had sold her through his own devices that he had put in his hand, and he would assure her again about saving these labels. As a matter of fact, we call this approach to selling the salesman plan. The merchandising idea on Borden Evaporated Milk is often referred to as the salesman plan. It is something he can do something about it right at the point of sale.

Q You spoke of his telling the housewife about the cooperating products. What do you mean by that?

A We belong to the Red Scissors Coupon Plan. That plan encompasses several products who have coupons on the l a b e l s which speeds up the purchasing. The combining of all these products speeds up the housewife's ability to get coupon premiums faster.

* * * *

[1336] Q I believe you a l s o had something called Saturday store sales.

A Yes, sir.

Q Can you tell us about those?

A A Saturday store sale consisted of a salesman spending that day actually working in the store, inter-

viewing consumers, and selling them from a large stack of evaporated milk.

* * * *

【1338】 Q Mr. Hall, I think we were starting to talk about Saturday store sales as we broke up for lunch. Would you tell us what those consisted of?

A The Saturday store sales were a prearranged thing arranged with the store owner or manager for the express purpose of conducting interviews in an effort to sell Borden Evaporated Milk to consumers.

【1339】 Q What sort of interviews?

A Selling interviews.

Q What was the general selling pitch used in those sales?

A To go back, a salesman is working from a large display of Borden's Evaporated Milk. He will have as his selling tools various devices such as starter coupons, the catalogues on the premium plan. As the consumers come down the aisle, he will aggressively approach them, with the idea of selling them Borden's Evaporated Milk. Specifically his spiel would deal with a quality story, and a clincher of the coupon.

* * * *

Q When the salesman was conducting the Saturday store sale on Borden's Evaporated Milk, did he have occasion to talk about other products in your line?

A Yes, Mr. Lukingbeal. I feel pretty sure that a good salesman, after he had done this job on evaporated

ated milk, would from time to time mention other products in the Borden line.

Q In what way or in what extent would he mention other products?

[1340] A For example, to name one, he is working right at the milk section and a consumer might move from the stack of milk over to the non-fat dry milk section, and if she picked up a package of Pet Milk, he would put in a pitch there fast, too. But it would be incidental to the total operation.

Q Is the salesman instructed routinely to make a sales pitch about Starlac at the end of this pitch about evap?

A Not as a standard routine, no, sir.

* * * *

[1342] Q Did you during 1957 have any representative calling on the medical profession with respect to any of your products?

A Yes, sir.

Q In respect of what products did they call on the medical profession?

A Evaporated milk.

Q Were any others mentioned during those calls?

A Yes, sir.

Q What?

A Starlac non-fat dry milk is a product that is of an a w f u l lot of interest to the medical profession. These men, in calling on doctors, would use Starlac as a door opener kind of a gimmick, to get the fellow talking as a good-will piece, and use that as a fast lead-in

on his pitch to evaporated milk, because his time was limited to the physicians.

Q What was his pitch on evaporated milk to the physician?

A To try to get this physician to recommend Borden brand evaporated milk to mothers and expectant mothers.

Q Did he give the physician some literature in his talk?

A Yes. He gave him a whole kit of materials: a baby record [1343] book; crib cards; prescription blanks. That type of thing. Conventional tools to work with. Occasionally we used coffee as a door opener. The stenographer, the receptionist, liked the coffee. It was a good lead-in. It was common discussion. It was something to get talking over. That was about the size of the coffee. I don't recall any other products being discussed.

Q You didn't think the receptionist would consider a can of evaporated milk a very good door opener, is that right?

A No, sir.

* * * *

[1348] Q During his testimony, Mr. Berry spoke of the problems having to do with being sure that by and large the oldest of the evaporated milk got shipped out first. Was there at the retail store level any problem of that character?

A One of the cardinal principles of selling evaporated milk is to make sure that the produce reaches the consumer in the freshest condition as possible.

This is attained by a process which we call stock rotation in the retail store, which means moving the oldest stock always ever forward to the consumer. If it is on a mass display, it means building it up; taking the bottom cases out and rotating them toward the top. It means that the back-of-the-store level is taken [1349] care of, making sure that rotation is properly done.

* * * *

[1355] Q Let's return just a moment to the subject of discussion this morning, about the relative importance of the in-store work, particularly the building of displays, in comparison to advertising with regard to evaporated milk as compared to coffee, which I believe was the example that was mentioned. You said you considered Pet and Carnation were your principal competitors, is that right, as far as the Borden Brand Evaporated Milk is concerned?

A That's correct.

[1356] Q You mentioned the importance in your view of the floor display work on the Borden Brand Evaporated Milk.

A Yes.

Q To what extent, if any, did you consider the Borden name important in that competition?

A Very important.

Q In what way?

A From a quality standpoint, the Borden name stands for unsurpassed quality in the dairy business. It had a very definite effect on the Borden Brand Evaporated Milk.

Q In the sale of evaporated milk in competition with Pet and Carnation?

A Yes, sir.

Q Pet and Carnation also advertise their names, do they not?

A Yes, sir.

Q In 1957 the name Borden was advertised in various connections, I take it.

A Yes.

Q We have been talking about the Borden Brand Evaporated Milk. Let's talk about the private label Borden evaporated milk packed by the company. The record in this case shows that as of January 1, 1956 Borden was packing private label evaporated milk for Safeway as well as I believe a few other customers. Did you at that time know anything about that [1357] operation?

A I was aware of the fact that we packed private label milk for Safeway.

Q Did you have any duties in that regard?

A No, sir, none whatsoever.

Q No responsibilities?

A No, sir. I had my hands full with the Borden Brand business.

Q Do you know who in the Borden Company was responsible for that business?

A Mr. Berry was responsible for that business.

* * * *

[1362] CROSS EXAMINATION

By Mr. Hays:

* * * *

[1372] Q I take it, then, there are stores that are not on salesmen's routes?

A That is correct.

Q What type of stores are these?

A They would be stores that were the smaller stores.

Q Were there any other type of stores not on salesmen's routes?

A You would have to take the selection of the store. We used the selection method of trying to cover the stores that did the greater dollar volume; that is, you can't get to all of them. It is physically impossible to cover every store in the country. So as a tradition and in a conventional manner, **[1373]** manufacturers try to cover those stores that do the volume of business.

* * * *

Q Isn't it a fact that your field force does not contact chain stores in an effort to get displays in?

A Do not contact?

Q Some chain stores.

A Some chain stores have policies that don't allow salesmen to call.

* * * *

[1375] Q In 1957, is it your testimony that there were approximately 250 salesmen in this field force?

A That would be the total organization, including jobbing salesmen and supervisors. That would be about an average figure, as I recall.

Q Including jobbing salesmen?

A Yes.

Q What is a jobbing salesman?

A We have, I believe, nine branch offices. A jobbing salesman, or a wholesale salesman, performs the function of calling on the wholesale warehouses and the jobbing warehouses, wholesale warehouses, chain warehouses, in a given territory. **[1376]** He performs the function that a broker does in other territories.

Q How many of these jobbing salesmen did you have in 1957, on the average?

A I would guess about 15.

Q Would it be correct to say that you had approximately 200 men that actually called on retail stores?

A About 200 full line salesmen calling on retail stores, concentrating on the full line.

* * * *

[1387] Q With reference to the calls by these salesmen on retail stores, about how many stores were included in a salesman's route?

A That would vary by territory. There were a good many factors that would control. The size of the stores, for one; the type of territory; the amount of traveling concerned. **[1388]** Those are the principal concerns.

Q Give us the range, then, from the minimum to the maximum.

A I don't recall specifically, but it could run from less to 100 up to several hundred.

Q Up to several hundred?

A Yes.

Q How many stores did a salesman normally call on in a day?

A About ten to eleven or twelve, somewhere along in there, I believe. That, of course, bears again on territory, type of stores, and the amount of traveling to be done.

* * * *

[1389] Q With reference to stores not covered by Borden's salesmen, who does all this rotating of the cans of evaporated milk?

A The stores themselves, I suppose, do that. The small stores do that. They have to. We don't. We don't call in on the salesmen to do that.

Q That would be true of the chains, also?

A On a chain which we would not allow a salesman to call on them. They naturally would have to do their own rotation. They accept that when they do this sort of a program.

* * * *

[1400] Q How long will Borden Branded Evaporated Milk normally keep without spoiling?

A Borden Brand, and any other brand of evaporat-

ed milk, will keep indefinitely, provided it is turned up end to end once every thirty days.

Q It will keep indefinitely?

A If it is turned completely over once every thirty days.

* * * *

[1424] Q Do you know what in-line pricing is?

A I certainly do.

[1425] Q What is it?

A In-line pricing means that if two products cost the same wholesale, they are retail priced similarly at the same price.

Q During 1957, weren't much of the efforts of your salesmen devoted to getting the s t o r e manager to price competitive products in line with the price of Borden products?

A Part of the service job that any good salesman performed for a retailer is to be sort of a price counselor to him, on whether his prices are in line or out of line. For example, he calls on a lot of stores. If the price of a Borden product is down here and the price of a competitor's product is here —

Q Lower or higher?

A Either way; it would be his duty to call it to his attention. A salesman wants to have his price right in line competitively, but he is not concerned with what the price is. If the price is 25 cents for two items in a store, competitive, let it be 25 cents. But if it is 30 cents in another store, let it be 30 cents. Just provided his

product is not penalized as a result of the dealer making a larger markup on it.

* * * *

[1432] REDIRECT EXAMINATION

By Mr. Lukingbeal:

Q With reference to the significance of sales in connection with determining when salesmen might be entitled to merit increases, as I understand it, the retail salesmen, as part of their routine, did take down orders from the store managers, is that right?

A Yes, sir.

Q Did those orders taken down by the retail men in the stores constitute any substantial part of the total sales of Borden brand goods in that sales district?

A It would be a very small percentage of the total sales in that district.

Q How was the major portion of the sales effected?

A The major portion of the sales are made directly to wholesale warehouses and chain warehouses.

* * * *

[1433] Q I take it it was the general job of the sales force, including these retail salesmen, to move those goods through the retail stores regardless of whether the sale itself had been effected at the wholesale level or as a result of an order taken in the retail store, is that right?

A Yes, sir, that's correct.

Q There was some discussion about whether chain

stores did or did not in 1957 let your retail salesmen in there. Were there any chain stores that did let your retail salesmen in?

A Yes, sir.

Q And there were some which did not?

A A relatively few that did not.

Q Was that in all cases a chain store-wide policy, or was there variation in a particular chain from branch to branch?

A It would vary from branch to branch.

Q Within a particular chain?

A Within a particular chain, that's right.

Q Did any of the chains make any distinction between letting your men in for the full line service, on the one hand, or letting them in just for some particular purpose, on the other hand?

A There were chains that allowed evaporated milk salesmen to go in for the purpose of inspecting the evaporated milk stock and rotating the stock in that particular store.

[1434] Q But they didn't want those fellows doing other things in that particular chain, is that it?

A That would be pretty true, yes, sir.

Q I take it that is because the chains didn't want to be bothered with this rotation work and so on or the evap?

A Yes, sir.

Q Mr. Hays questioned you about the average number of times or the general number of times that one of your retail salesmen would visit a particular store and you spoke of six to eight weeks. Were there exceptions to that with regard to particular stores?

A Our particular routing system — and in this I am

making the average type of a salesman's route — had what we call an inside route and an outside route.

Q What was the difference between the two?

A The inside route was made up of the heavier traffic stores, heavier volume stores in the route. Generally speaking, those stores were also stores that were in the salesman's accessible area. A salesman wouldn't ride 150 miles to call on an inside route store, but the general theory of the coverage was that he would cover the larger stores more frequently than the smaller stores in his route.

* * * *

[1441] GEORGE G. LEARY was called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

Q Will you please state your full name?

A George G. Leary.

Q Your address?

A Number 30 Standish Drive, Scarsdale, New York.

Q Mr. Leary, what is your present position with the Borden Company?

A I am general sales manager of the Borden Foods Company.

Q What was your position during 1957?

A I was division manager of the Borden Foods Company, with headquarters in Detroit.

Q How long have you been with the Borden Company?

A I have been with the Borden Company since 1935.

Q Would you tell us just very briefly the different positions [1442] you have held and the approximate dates and places involved?

A I joined the Borden Company in a secretarial capacity, and from 1935 to 1941 I served as secretary to two different presidents of the company. After completing four years of Naval service, in 1946, the end of 1946, I was transferred to the then grocery product division of the Borden Company and went out as a retail salesman here in New York.

I then served as a doctor detail man on evaporated milk, later doing some supervisory work with salesmen here in New York, and in 1950 I became a district sales manager in Detroit.

In January of 1952, I became division manager, and on January 1, 1959, I became general sales manager.

Q Just generally, what was the geographic extent of the area under your supervision when you were division manager of the central division?

A The central division commenced just west of Youngstown, Ohio, and went west to North Dakota. It was an 11-state area, down to the Tennessee border roughly.

Q Did it include West Virginia?

A Yes, part of West Virginia.

* * * *

[1457] CROSS EXAMINATION

By Mr. von Brand:

* * * *

[1461] Q You testified that in two of the districts in your division, Rich Roast was introduced in 1957?

A That's right.

Q Was this throughout the entire district?

[1462] A Throughout those entire districts.

Q Throughout 5-A and 5-B, is that correct?

A That's right.

Q You stated t h a t the additional men that were sent in to t h e s e areas to help with the introduction were supervisors, jobbing salesmen and men of the district manager category. W h a t do you mean by "men of the district manager category"?

A Well, at the outset, I said, to the best of my recollection, t h a t that was the t y p e of individual we brought in.

Q Would individuals in that category have a higher salary than an ordinary retail salesman?

A Yes.

* * * *

[1473] Q During the Rich Roast introduction, was it necessary to let your activities on other products slide for a while?

A During the introduction period?

Q Yes.

A Yes.

* * * *

[1476] Q Did your salesmen call on smaller stores in the central division?

A Smaller stores?

Q That is, smaller independent types of stores.

A How small are you referring to?

Q Do you have any policy as to the type of store on which your salesmen are to call, or did you in 1957?

A We tried to cover stores that — to cover only stores that were doing a minimum of roughly \$200,000 a year in volume.

Q And you avoided the other stores?

A That's right.

[1477] Q What is the function of a jobbing salesman?

A A jobbing salesman calls on what we refer to as direct accounts, jobbers, chain headquarters and so forth.

Q It is his job to sell to such accounts?

A It is.

Q Does he physically handle products?

A In what way?

Q In other words, is his job one largely of order-taking?

A That's right, he sells.

* * * *

[1478] REDIRECT EXAMINATION

By Mr. Lukingbeal:

Q Mr. Leary, Mr. von Brand asked you about a situation where one of your salesmen in a store would see a customer pick up some Cherub Label Evaporated Milk. You said in that case the salesman would not make any efforts to dissuade the customer from completing that transaction. Let me pose another hypothetical situation. Suppose one of your salesmen in a store sees a customer pick up a private label brand of evaporated milk which was in fact packed for that store owner by somebody other than Borden. What does your retail salesmen do about it?

A Absolutely nothing.

Q In other words, he made no distinction, based on who packed the private label milk, is that right?

A No distinction whatsoever.

Q In either case, he did not try to dissuade the customer from purchasing that store owner's private brand of evaporated [1479] milk, is that right?

A He did not.

Q Why not?

A Number one, private label was never discussed or mentioned with our retail sales force. We were primarily interested in the national brand competition to the Borden brand.

Q Well, did your retail salesmen have instructions not to try to dissuade a customer in a store from purchasing the store owner's own private brand of evaporated milk?

A I don't recall specific instructions, written instructions, but it was good common sense not to do

anything about it, not to concern yourself with private label merchandise because the dealers — t h a t was their label. That was their merchandise. They were primarily interested in that brand.

Q And you didn't want to ruffle their feathers by standing right in their store and suggesting that somebody not buy it?

A It could very well have been that if one of our men got involved in a situation like that, that it would have been his last call in that store.

MR. LUKINGBEAL:

That is all, sir.

* * * *

[1480] WILLIAM TALMADGE CROWE was thereupon called as a witness on behalf of the respondent and, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

Q Will you please state your full name and address.

A William Talmadge Crowe, 92-18 Marlive Lane, Houston, Texas.

Q Mr. Crowe, what is your present position with the Borden Company?

A Director of sales for the Foods Division of the Borden Company Southern Division.

Q And what was your position during 1957?

A I was Southern Division Sales Manager.

Q How long have you been with Borden's?

A Since early 1942.

* * * *

[1484] Q In 1957, did you personally ever get into one of these retail stores where evaporated milk was being sold?

A Yes, sir, I did, a lot. That was very important to us in the field. I would estimate that I was on the road in 1957 roughly about three days out of each and every week for the year. It would average about that.

Q What did you do in those three days?

A Usually, I would spend at least one day either working with a retail salesman in the stores or riding to a number of stores by myself, or with a broker, or with a supervisor, appraising the retail work in those stores.

Q What did you do to appraise the retail work?

A I would first check the appearance of our product, the number of rows of evaporated milk as compared with Pet or Carnation to see if we had equal shelf space or better than equal shelf space.

Q Better than equal shelf space?

[1485] A Yes. I would c h e c k for rotation of the stock, to dig in the back and make sure the product was fresh.

* * * *

[1486] Q Did you have any particular view in 1957 as to the importance of floor displays of evaporated

milk as compared [1487] with other merchandising or promotional techniques?

A Yes.

Q What was that view?

A Well, past history has proved very definitely that floor displays can increase and will increase the sale of our evaporated milk.

Q Did you in 1957 have in mind any particular incidents that you had known about, which tended to afford some specific proof in your mind of that statement?

A Well, if I might draw a parallel to a period prior to the complaint period — of course, I would have to do that to highlight what we were doing in 1957. Back about 1949 or 1950 — I have forgotten the exact date in there — we elected to prove that added displays in store merchandising — t h a t is, securing additional shelf space, concentrating on doctors, hospitals and just good all around work on evaporated milk would increase our business. Management approved the additional manpower to put on this project. Actually, it was only two men in each one of these markets.

We selected Greensboro, North Carolina and Charlotte, North Carolina for this test. We went in there with the two men in each market, additional men, and concentrated on the procedure that I mentioned before, and we kept hammering a w a y at evaporated milk. These men did not work any other product except evaporated milk.

[1488] Q These men, I take it, were there in addition to the regular store workers? You had a regular force in those towns?

A We had one full-line salesman in each of those

towns, yes. We watched the business grow, and that period of about five years — I believe that is the approximate date on this — we had trebled our business in the Charlotte market and more than doubled our business in the Greensboro market. Consequently, that proved to us that this type of merchandising paid off and we still concentrate in store work on evaporated milk in the south.

Q Do you have an idea in general from whom you took t h a t added business you got in Charlotte and Greensboro?

A I would say that the majority of that came from Carnation, because at that time they were the number one seller in the market. Pet was number two.

Q What was Carnation doing with reference to in-store work while you had these extra men in those towns?

A They were fighting back, just to try to stop us if they could, but it seems like we had a little luck or maybe we worked a little harder and we made progress. They didn't sit there and let us take it.

Q Did you in 1957, down in your division, use these tote carton things?

A Yes, very much so. In fact, the tote cartons is one [1489] of the tools we used in the Greensboro-Charlotte test to start it off. It was the first area, to my knowledge, to use tote cartons.

Q That is part of what those men did in Charlotte and Greensboro?

A Yes.

Q That is, to pack these tote cartons in the stores?

A Yes.

Q And that is what you were doing in 1957?

A Yes, sir, wherever we could find the extra space to put them.

* * * *

[1499] CROSS EXAMINATION

By Mr. Hays:

* * * *

[1501] Q In 1957, did the salesmen under you sell Borden brand evaporated milk to Quik-Chek stores?

A The milk that was sold direct to Quik-Chek would be delivered to their warehouse. That would be sold by a broker, Greene Brothers.

Q Did your full line men promote the sale of Borden brand evaporated milk in Quik-Chek stores in 1957?

A Yes, sir.

Q Their activities were similar to the activities that you have testified to generally on direct examination, is that right?

A That's right, sir.

* * * *

[1503] Q In 1957, in how many different retail stores did these full line salesmen promote the various products?

A Total stores?

Q Yes.

A I couldn't tell you; I don't know.

Q Is it more than 10,000?

A No, we wouldn't work 10,000. It would be less.

Q Would it be more than 9,000?

A Well, if you want an approximate answer, and it sure would have to be approximate, I would say somewhere around 7,000 stores.

Q In 1957, full line salesmen or promotion men promoted the other products, is that true?

A Yes, sir.

Q Will you name those products?

[1504] A Borden's Starlac, Borden's Malted Milk, Borden's Instant Coffee, None-Such Mincemeat, Eagle Brand Condensed Milk, Household Brand Condensed Milk, Hemo, and we had Dutch Chocolate in one market. I might have left something out.

* * * *

[1544] EDWARD M. DARCEY thereupon resumed the stand and testified further as follows:

DIRECT EXAMINATION (cont'd)

By Mr. Lukingbeal:

Q Mr. Darcey, since our last hearing in this matter in December, I believe that you had a number of conferences up at the Borden Company with Mr. Steele of the Commission's accounting staff, is that right?

A Yes, sir.

Q And the general subject matter of those conferences was your report, Respondent's Exhibit No. 73 for identification, is that right?

A Yes, sir.

Q Would it be fair to say that in general you went over the various schedules and the ways in which you compiled them and so on?

A To the extent that Mr. Steele asked me to, yes.

* * * *

[1547] Mr. Darcey, aside from the three pages that I have mentioned, will you tell us whether Respondent's Exhibit 76 for identification contains the same pages as are contained in Respondent's Exhibit 73 for identification?

A Yes, sir.

* * * *

[1548] Q Mr. Darcey, aside from the changes aggregating approximately one cent per case which are encompassed in and reflected in Respondent's Exhibit 75A, B and C for identification, did your discussions with Mr. Steele, or any other work that you may have done in the interim since our December hearings, result in your wishing to make any other modification in your report?

* * * *

[1549] Q Mr. Darcey, I show you Respondent's Exhibits 77A and 77B for identification. I ask you if you can tell us what those are, please.

MR. HAYS:

Will you give us a moment to dig our copy out and compare it?

MR. LUKINGBEAL:

Yes.

A These are summaries covering the year 1957 of shipments made into the various brokerage areas identified by the city which was deemed to be the principal city in the brokerage area, or the brokerage area by which it was known. It shows the total number of cases shipped into the brokerage areas and the percentage which each of the evaporated milk plants shipped into that area. This is tall-size cans only.

Q Of the Borden brand evaporated milk?

A Yes, sir.

Q I believe, Mr. Darcey, there are a couple of respects in [1550] which this schedule is incomplete in that you did not have complete data available, is that right?

A Yes, sir.

Q And what are those respects, sir?

A There are two respects. One is the fact that we did not have the underlying information because I believe it was not maintained as part of the regular records of the company with respect to the two western plants, the one at Modesta, California and the one at Albany, Oregon. In addition, we did not have the information, not because it had not been kept in the ordinary course, but because it was no longer available — we did not have the information with respect to shipments from reserve warehouses relating to the beginning of 1957.

Q Approximately what proportion of the total shipments of Borden brand evaporated milk during the year 1957 are encompassed on these schedules?

A Well, as I said, Mr. Lukingbeal, this covers tall-size cans only. The aggregate is 3,325,000, or about 85 per cent of the tall-size cans shipped in 1957.

* * * *

[1563] Q Mr. Darcey, I show you Respondent's Exhibits for identification 79A through i and I ask you to tell us what those are, if you know.

A Yes, sir. These are sheets that summarize for 1957 the shipments from each plant directly to customers or to consignment warehouses, or to customers or to consignment warehouses **[1564]** through reserve warehouses, showing the final destination in terms of brokerage area as defined with respect to Respondent's Exhibits 77A and B.

Q In other words, Mr. Darcey, is it fair to say that these documents, 79A through i, are tabulations of the same basic information that you used in preparing Respondent's Exhibits 77A and 77B?

A Yes, sir.

Q Except that in respect of these latter ones, 79A through i, what you do is start with each plant and show the percentage of that plant's shipments that went into various brokerage areas, is that right?

A Yes, sir.

Q Am I correct in my understanding that all that you said with regard to Respondent's Exhibits 77A and B, as to the proportion of the total business which is covered and as to the source documents from which

you compiled these exhibits, applies to these exhibits, Respondent's 79A through i?

A Yes, sir.

* * * *

[1565] Q Mr. Darcey, I show you Respondent's Exhibit 80 for identification and ask you if you can tell us what that is?

A Yes, sir. This is a summary of the 1957 private label sales stated on a tall-size basis, showing the amounts billed to certain customers from each of the plants and showing, as to all other customers, the total amount only.

Q And this, I believe, is taken from the various exhibits that are in evidence that showed private label billings in 1957, is that right?

A Yes, sir.

Q This was prepared under your supervision?

A Yes, sir.

* * * *

[1585] Q Mr. Darcey, referring to Respondent's Exhibit 76 for identification and to Schedule 12 of that document, that schedule is headed "Sales Department." Beginning at the bottom of Page 1 of Schedule 12, you address yourself to the joint or unapplied expenses of the sales department. You point [1586] out that in view of certain considerations which you mention there on page 2, that you made an allocation of the salaries and expenses of the field representatives on a dollar sales basis, and then you say, in the first

full paragraph on Page 2 of Schedule 12, that the dollar sales basis was, in your judgment, "a conservative basis" for determining the appropriate amount of the charge against the Borden Brand Evaporated Milk.

Yesterday afternoon, you testified with respect to three further computations which had not previously been offered in evidence in this proceeding. I refer to Respondent's Exhibit 81, which is a tabulation of the percentage of the total number of consumer units or packages sold by the food products division, which consisted of the Borden Brand Evaporated Milk, and that percentage, you will recall, is considerably higher than the percentage that you used in connection with your dollar sales allocation. I also refer to Respondent's Exhibit 82, which is your tabulation of the displays of the various items in the line that were built by the salesmen in 1957.

In that connection, your tabulation shows that, if you direct your attention to all kinds of displays taken together, the percentage which consisted of the Borden Brand Evaporated Milk was somewhat smaller than the dollar sales percentage which you used. On the other hand, if you direct your attention to the floor displays alone, the percentage, which was made up of [1587] the Borden Brand Evaporated Milk, was somewhat larger than the dollar sales percentage which you used.

Finally, I am referring to Respondent's Exhibit 83 which has to do with the gross margins computed in three different ways, depending upon precisely how you dealt with the different adjustments that were in order from time to time; and the gross margin per

centages in respect of the Borden Brand Evaporated Milk, as shown on this computation, are slightly smaller than the dollar sales percentage which you use.

Now, Mr. Darcey, will you tell us what, if any, bearing these three exhibits that I have just referred to have on your view with respect to your statement that the dollar sales basis of allocation is a conservative basis?

A Essentially, Mr. Lukingbeal, I decided upon using the dollar sales allocation basis because it is a commonly accepted one and also, after talking to the various business people, it was my conclusion that the dollar sales percentage was, as I said, a conservative way of allocating these joint or unapplied costs.

In the course of various work that I had done, I decided to apply these other tests which I considered to be perhaps a little more objective, dealing with the number of consumer units, which, as I understood the method of operation, had a great bearing on how the field force spent their time. That showed 70-odd percent as opposed to the 44 percent dollar sales [1588] allocation. That led me to believe that I was conservative.

Turning to the number of displays, the total of all displays on evaporated milk was about 41 percent as opposed to the 44 percent sales dollar allocation. Again, having talked to the business people, it was my understanding that as a general rule evaporated milk displays were larger than displays of other products; also, that the largest displays of all products were the floor displays. Comparing the percentage of total dollar displays, or the percentage of evaporated milk floor displays with the total floor displays again

persuaded me that the 44 percent dollar sales allocation was conservative.

One of the other methods that is often commonly used for allocation of joint or unapplied costs is the gross margin percentage. I also determined the percentages that each of these products contributed to the total margin for the division. It indicated that, on any one of the three bases that I used, that evaporated milk contributed slightly less, in terms of margin, than the 44 percent sales dollar allocation.

Q What were the percentages as shown in your exhibit, Mr. Darcey?

A Well, the gross margin before adjustment was 39.83 percent; the gross margin after regular adjustments — that is after the usual adjustments commonly made by the company only at the year end — that percentage was 40.10 percent; and the gross margin after taking all adjustments into account was [1589] 42.24 percent. That indicated to me that the 44 percent was not an illogical measure as to evaporated milk because these percentages were very close to it.

However, looking at the margins on the other products, it seemed to me that in several cases there was such an absence of relation between the sales dollar and the gross margin that I did not feel justified in dropping from the 44.02 sales allocation percentage any one of these gross margin percentages. Again, my judgment was fortified by all of these other facts that I had heard and these other two tests that I had applied.

Q Mr. Darcey, with respect to that last consideration that you mentioned — that is, the extent to which the gross margin test or allocation formula would p

vide a realistic answer in respect of the products in the line other than the Borden Brand Evaporated Milk — can you give us examples of products where that yardstick would obviously not have provided an appropriate answer?

A Well, there has been so much talk about Rich Roast Coffee in the last few days, that the gross margin before any adjustment at all on Rich Roast Coffee was 9.01 percent, but dollar coffee sales were 18.68 percent of the total. In other words, the margin was half the dollar sales allocation. Yet I knew that they had this Rich Roast introduction. It just seemed to me to be illogical to think that they were looking at the [1590] margin and yet spending this time on coffee, which would have been half of the dollar sales allocation percentages.

Also, Mincemeat, the dollar sales allocation percentage there was 4.83 percent and the gross margin percentage, before any adjustment, was 7.96 percent. Yet from everything I had heard, this mincemeat, while it did involve work by the field force, it was a seasonal product and I don't like to say it sold itself, but the demand appeared seasonally and to that extent, as I understand the business facts that I heard, it did require somewhat less selling effort than the gross margin percentage would indicate.

Also, one o t h e r consideration. In talking to these business people, none of t h e m talked to me about gross margins as any part of t h e i r thinking. They thought in terms of sales dollars and in terms of cases of products; in other words, sales dollar, on the one hand, and quantities of cases on the other hand. I am not sure that — as I say, none of these people talked about gross margins to me at all.

Q As far as that last factor is concerned, it was your judgment that the dollar sales more precisely reflected the nature of the business thinking as you understood it, is that right?

A Yes, sir, and also, as I say, I had heard so much and continued to hear so much about the physical effort required in handling evaporated milk, which I think is clearly borne out by the percentage of floor displays on evaporated to total [1591] floor displays, and also by the number of consumer units of evaporated milk compared to consumer units of all products, including evaporated milk, again dealing only with advertising brands.

Q In your accounting work generally, do you from time to time find situations where it is not possible to make a precise mathematical computation with respect to some particular matter?

A Yes, fairly often, sir.

Q And when you find such a situation, what do you do about it?

A Well, I think the general approach is, what are the business facts, the objective you are trying to attain, what the business people have in mind, and what, let us say, the commonly used allocation formulas tend best to reflect as to the business facts.

Q Having considered the matters, the kind you have just mentioned, you do that and get that answer by using an allocation formula, is that right?

A Yes, sir.

Q You don't just throw up your hands and say there is no answer?

A No, sir.

* * * *

[1595] CROSS EXAMINATION

By Mr. Hays:

* * * *

Q Mr. Darcey, have you prepared any other cost justification studies in the course of your accounting training?

A No, sir.

Q This Respondent's Exhibit 76 is the first such study you have prepared?

A Yes, sir.

Q Have you had any training with reference to cost justification studies?

A No, sir.

* * * *

[1598] Q When did you commence the preparation of this cost justification study which is reflected in Respondent's Exhibit 76?

A Around the end of June, 1959.

Q And when was the first time you talked to Dr. Taggart about this cost justification study?

A Some time in July. I don't know the exact date.

Q Shortly after you started?

A Yes, sir. I would say within a month, at least.

Q Was that the first time you talked to Dr. Taggart?

A Yes, sir. I had never met Dr. Taggart before.

Q You met him here in New York?

A Yes, sir.

Q And what was the subject of that discussion?

[1599] A I of course knew who Dr. Taggart was and his reputation in this field of Robinson-Patman Act accounting. If I remember correctly, principally I discussed with him the way I intended to approach the specific accounting areas and whether he could help me in determining whether my methodology was right. I had realized by the time I met Dr. Taggart that some of the elements in this cost justification report, although I had not exactly made up my mind what would be in it at that time — but that some of the elements that were differences were susceptible in more or less degree of precise determination. Some of them I felt pretty sure by enough work we could button down almost to the penny. Others, I knew we would have to attack by either a sample method — and I don't know whether I had this specifically in mind, although I think in mind — as to these unapplied field expenses, might be done by the use of an allocation method; that is, an allocation percentage.

Q In other words, Dr. Taggart was an expert in Robinson-Patman Act accounting in your own mind, is that right?

A Yes, sir.

* * * *

[1600] Q Will you examine Page 8 of Respondent's Exhibit 76 and state just which of those headings you discussed with Dr. Taggart during the course of your conversations and meetings and so forth?

A I have to say every one, Mr. Hays, in more or less detail **[1601]** as among them, but every one, sir.

Q Which did you discuss in greater detail?

A It would be the allocation of the sales department.

Q That is item number 12, is that right?

A Yes, sir.

Q I direct your attention again to page 8 of Respondent's Exhibit 76, Mr. Darcey, in connection to item number 1, reading across to a "Per Case Price." Do you have that figure?

A Yes, sir.

* * * *

Q The per case price for Borden Brand is \$6.4046, is that right?

A Yes, sir.

Q That is an average price, is it not?

A Yes, sir.

Q It is a national average price, is it not?

A Yes, sir.

* * * *

[1602] Q I direct your attention further to item No. 1 and the private label price.

* * * *

Q That is an average price, \$5.1743, is that right?

A Yes, sir.

Q That average price is a national price for all private label milk sold in the United States in 1957, is it not?

A Yes, sir.

Q At no time in 1957 was private label milk sold at \$5.1743 per case, was it?

A I don't think so, no.

Q During 1957, Borden label evaporated milk was sold at prices higher than \$6.4046, was it not?

A Yes, sir.

Q During 1957, private label evaporated milk was sold at prices lower than \$5.1743 per case, isn't that true?

A Yes, sir.

* * * *

[1612] Q I direct your attention to Page 1, about seven or eight lines from the bottom of that page, where you refer to some aspects of evaporated milk operations and related costs; that is, freight and reserve storage, as having significant seasonal patterns, is that right?

A Yes, sir.

Q Will you describe what you meant by "significant seasonal patterns," as that term is used in Respondent's Exhibit 76?

A Yes, sir. The supply of raw milk varies over the course [1613] of a calendar year. As a result of that variance, the milk available for manufacturing purposes — that is, for conversion into evaporated milk — is more at some seasons of the year than it is at other seasons. That results in different amounts of production at the evaporated milk factories at some seasons than at others. The Borden Company practice is to pack a lot of milk in what they call the flush sea-

son, which varies a little bit from one area of the country to another.

* * *

[1615] Q Why did you exclude government and export business from your cost study?

A Basically, Mr. Hays, because the complaint, as I understood it, was directed to Borden brand evaporated milk versus private label. That was my basic consideration.

Q Was the government business — did it have Borden brand labels on it?

A Most of it — I ran into at least one instance where I am convinced that they sold milk without a label on it at all.

* * *

[1631] MR. LUKINGBEAL:

May I have just one further fact appear on the record with respect to this document matter, which is that the number of pages which we furnished to Commission counsel in connection with their investigation of the cost justification matter in recent months aggregated more than 20,000. Of that number, they asked us to photostat a number of more than 1,000. I believe, and we did photostat them.

MR. HAYS:

This investigation and the documents, of course, resulted from the previous offer I made to make this investigation at a Commission expense and send men up

to Borden, to their offices, and spend a lot of their time on the road at government expense, without prejudice. I think I reserved every right in the book when I agreed to do that. I think that is on the record, your Honor.

* * * *

[1633] Q I direct your attention to page 3 and I note that your study included confectioner sizes and small 96's, of Borden Brand Evaporated Milk, is that right?

A Yes, sir.

Q As a matter of fact, confectioner's size was not sold in private label, was it?

A No, sir.

Q As a matter of fact, small 96's were not sold under private label, were they?

A Not domestically, sir.

Q To the extent that your study includes information with reference to these two items, it involves a comparing of non-comparable, non-identical items, does it not, as between Borden Label and private label?

A Non-comparable in the sense that no confectioner size was sold with a private label and no small 96's were sold as a private label, yes, sir, that is true, but as to non-identical, **[1634]** the milk in the cans is the same. I don't know whether I am missing some distinction.

* * * *

[1635] Q In 1957, there were a great many areas where Borden Label was sold and private label was not sold, is that right?

* * * *

[1636] A You said areas, Mr. Hays. May I think of that as brokerage areas?

Q Yes, sir.

A There were many brokerage areas into which private label milk was not shipped, yes.

Q And Borden Label Milk was shipped?

A Yes, sir.

[1637] Q In 1957, there were shipments from factory to customer of Borden label evaporated milk which did not pass through reserve warehouses, is that correct?

A Yes, sir.

Q Did your investigation indicate the quantities that did not pass through reserve warehouses in 1957?

A Well, by indirection, in that we knew how much went through reserve warehouses, and therefore the difference did not. But as to whether all that was shipped directly to customers, I think the answer is no, because some of it went to consignment warehouses in the various brokerage areas.

Q Your investigation, I take it, did indicate that there were a number of direct shipments that went directly from factory to the customer and did not pass through either reserve warehouses or consignment warehouses?

A Most shipments, yes.

Q Were of that category?

A Yes, sir.

Q For purposes of your cost study, did you consider

reserve warehouse expense as a direct cost or a direct expense?

* * *

[1638] A Yes, sir, I considered it to be a cost directly applicable to Borden brand evaporated milk.

Q As a matter of fact, it was a cost directly applicable to the Borden brand evaporated milk that passed through that warehouse, or through those warehouses, wasn't it?

A Yes, sir.

Q In other words, you could very well go and find out what the warehouse charges were on what milk went through there, couldn't you?

A Yes, sir.

Q You didn't handle that in your cost study in the same matter you handled export and government business, did you?

A This was Borden brand domestic business, sir. As I said, our investigation or review was not directed to government or export business. This was part of the Borden brand operation. Therefore I included it.

Q You did not exclude it?

A No, I included it.

Q With the view of measuring the actual cost, I believe **[1639]** it is your testimony that the cost for export and government business was kept separate from the rest of the evaporated milk business?

A Yes, sir.

Q And as a practical matter, the costs for the reserve warehouses were kept separate, were they not?

A Yes, sir.

* * * *

Q Mr. Darcey, I direct your attention to Page 5, the last three lines at the bottom of the page. You have a statement as follows: "The brokers, salesmen and field representatives had no responsibility for and performed no services in connection with the promotion or sale of private label milk." I hand you Commission's Exhibits for identification, 5320, 5321A, 5321B, 5321C and 5322. I ask you to examine these documents and state whether or not you had them before you at the time you made your statement that I have just quoted.

A Mr. Hays, at the time I wrote that, which as I think I said was probably some time back in December, I was not [1640] aware of this situation. Before this Exhibit 76 was introduced, I had become aware of this. I had not seen the documents, though.

Q And you did not make any change in your statement as it appears in Commission's Exhibit 76 after having seen these documents, is that right?

A No, I did not, sir.

* * * *

[1641] Q In other words, you were aware of the situation that is reflected in those documents, but you did not change the statement in Respondent's Exhibit 76?

A That's right.

* * * *

[1657] Q I direct your attention to Schedule 4 on page 2. At the bottom of the page, why did you consider it necessary to relate the cost of each private label brand directly to the sales of each private label brand?

A If I may turn to page 1 of that schedule, we stated there that there were differences in the cost of private brand labels and cartons as opposed to Borden brand labels and cartons, because of differences in the sources of supply, quantities, specifications and so forth. Also, some customers furnished the labels to Borden's at no charge. Other customers furnished, I believe, their own cartons at no charge.

Q Approximately, how many cartons for how many cases were furnished by customers with reference to private label evaporated milk?

A That information is in my working papers. I don't recollect it, Mr. Hays.

Q Once you accumulated the total costs for cartons with reference to private label evaporated milk, did you divide it **[1658]** by the number of cases sold, or did you divide it by the number of cases on which the Borden Company furnished the cartons?

THE WITNESS:

Would you read the question, please?

(Question read.)

A I think, Mr. Hays, that I better explain what we did. Maybe my report is not clear in that respect. We determined essentially a unit cost for cartons and for labels separately for each private label.

* * * *

[1661] Q What would have been the effect with reference to your cost per case sold figure if you had taken your aggregated dollar figure and used a divisor which reflected only the unit amount of cases on which the B o r d e n Company actually furnished cartons, labels and stenciling?

A I don't know that I could have arrived at such an amount because in many cases the customer furnished the label but not the carton.

Q Suppose you had used just the amount used as a divisor, the unit amount of the cases on which the Borden Company supplied the cartons?

A I don't think I could have gotten a meaningful amount that way. The only way to perhaps have dealt with the problem that we are discussing would have been to have **[1662]** adjusted the gross sales price to eliminate the charge to the customer for the cartons and/or labeling and/or stenciling. I think the net effect would be essentially a zero.

* * * *

[1665] Q Well, your cost per case sold figure, Schedule 5, Page 2, is an average cost, is that right?

A Yes, sir.

Q In reaching that average, you took into consideration the cost of shipments to reserve warehouses, is that right?

A Yes, sir.

Q And you took into consideration the cost of shipments out of reserve warehouses, is that right?

A Yes, sir.

Q And you also took into consideration the cost of direct shipments, is that correct?

A Yes, sir.

[1666] Q And for purposes of your computation your average figure does not distinguish which type of shipment was involved, does it?

A No, sir.

Q Once again referring to Schedule 5, Page 3, the first sentence on private label, "Private label evaporated milk was not shipped to consignment warehouses or to reserve warehouses." It is also true that substantial quantities of Borden label evaporated milk were not shipped to consignment warehouses or to reserve warehouses, is that correct?

A Yes, sir.

* * * *

[1674] Q Are you familiar with the Red Scissors Plan?

A Generally, yes.

Q And the payments reflected on Schedule 10, page 2, were payments which related to the Red Scissors Plan, were they not?

A Yes, sir.

Q What was the Red Scissors Plan in 1957?

A Well, the Borden Company, the Colgate Company, Mrs. Filbert's Margarine, and the William B. Leary Company, I believe it is, were the four principal cooperators, as they called themselves. All of the companies sold products which contained a premium label. As part of this plan, Premium Associates, Inc. was the agency which maintained stores, which the

rented and in which they used their own employees. They also maintained what I think they referred to as agencies. That is, they would arrange with a furniture store or a small department store to maintain a supply of the merchandise to be given in return for coupons, and they would redeem these [1675] coupons for the various cooperators, the four people that I named, plus others. The four ones that I named were the companies that owned the stock of Premium Associates. There were other people for whom this same service was performed.

Q How did these other people pay for this service?

A Generally, on exactly the same basis as the four owners of the company.

Q Did they pay any sums to the Borden Company?

A Did who pay any sums to the Borden Company?

Q The other cooperators.

A Not in respect of this premium label plan, no, sir. They might have been customers of the Borden Company or something, but not in respect of this plan.

Q In other words, Borden did not receive any reimbursement from them?

A From the other cooperators?

Q Yes.

A Including the other owners?

Q Yes.

A No, sir.

Q Did your computation take into consideration the fact that various sales force representatives of the Borden Company went in to stores and placed these premiums on various other products not made by the Borden Company or sold by the Borden [1676] Company?

A You mean these extra value certificates?

Q Yes.

A Did my computation what?

Q Take that into consideration.

A My computation of the amount shown on Schedule 10?

Q Yes.

A No, sir.

Q Did your computation take into consideration the fact that Premium Associates had an earned surplus for the year 1957?

A No, sir.

Q Did it take into consideration the fact that the Borden Company owned part of Premium Associates, or had a stock interest in Premium Associates?

A I don't see how that would affect my computation, sir, except perhaps if you are thinking in the way that you asked the question previously, did it take into account the fact that Premium Associates had an earned surplus for 1957.

Q It did not take into consideration either of those facts, then.

A No, sir.

Q I refer you to Schedule 11, page 1, Mr. Darcey. Will you look at the second paragraph, on advertising?

A Yes, sir.

[1677] Q I note that a certain amount of the all-Borden advertising budget was allocated to Borden Brand Evaporated Milk. Does that mean that it was spent in advertising evaporated milk, Borden Brand?

A There was no direct relationship, sir.

Q In other words, this allocation was just that?

It does not necessarily mean that that amount of money was spent in advertising Borden Brand Evaporated Milk, does it?

A That's right, sir. This amount allocated to Borden Brand Evaporated Milk was determined really at the top of the company, and the people who had made this decision had in mind the fact that Borden Brand Evaporated bore the Borden name; that it did benefit from the fact that it was another one of the Borden products and that it got the benefit of the slogan: "If it's Borden's, it's got to be good."

* * * *

[1679] Q I direct your attention to Schedule 13, Page 1. Is it not a fact that during 1957 substantial amounts of Cherub Brand evaporated milk were shipped to Safeway?

A Yes, sir.

Q Isn't it a fact that no brokerage in the amount of two and one half cents was paid to brokers on shipments of Cherub Brand in 1957?

A Yes, sir.

Q Is it not a fact that there were other sales of private label evaporated milk in which the two and one half cents per case commission was not paid?

A Yes, sir.

* * * *

[1725] CROSS-EXAMINATION

By Mr. Von Brand:

* * * *

[1739] Q Mr. Darcey, I direct your attention to Schedule 12 of your cost study, page 4. That schedule has an item thereon entitled "Direct expenses, salaries, travel, etc."

Will you tell us, please, precisely who were the individuals whose salaries and expenses were charged directly to evaporated milk under this item?

A Could you read the question, please?

(Question read.)

THE WITNESS:

I do not know the names, Mr. Von Brand, and I don't know that I can answer what you asked me precisely.

These were the people who were classified generally as combination — full line salesmen in 1957.

[1740] By Mr. Von Brand:

Q Was this the only category of Borden sales employees whose expenses were charged directly to Borden Evaporated Milk under this item?

A No, sir. I beg your pardon. I forgot Saturday store work, the amount paid with respect to Saturday store sales of evaporated milk were charged to that group of accounts.

Q They are also included in that figure?

A Yes, sir.

Q Will you describe the activities for which such direct charges were made, and which are included in this item? In other words, what did the combination

"full line" men do for which there is this direct charge?

A The combination full line men by definition were those who devoted more than twenty per cent of their time to evaporated milk work. Those people generally did medical detail work, calling on doctors and-or hospitals. However, they also did additional work on evaporated milk in the stores.

Q Now, do I understand you correctly, Mr. Darcey, that this item of "Direct Expenses, Salaries, Travel, et cetera," includes medical detail work to doctors and hospitals?

A Yes, sir.

Q In other words, medical detail work was not a full line charge?

[1741] A No, sir.

Q Were these the only activities for which a direct charge was made to Borden Evaporated Milk, namely, Saturday store sales and medical work?

A Oh, no, sir; I thought I said that in addition to the medical work done by these combination full line salesmen they also did work in stores on evaporated milk.

Q Am I to understand that you had records showing that a combination full line salesman did a full day's work on evaporated milk and you consequently made a direct charge to evaporated milk for such work in the store?

A No, sir. The amount shown here is salaries, travel, et cetera, under Direct Expenses charged to Borden Evaporated Milk directly from the company's accounting records, that is the way they charge these

salaries and travel expenses of these people.

As to these combination full line men, the Company had made a judgment that anybody who spent more than 20 percent of his time on evaporated milk only would be charged as a combination full line salesman; that is, 50 percent of his salary would be charged directly to evaporated milk, 50 percent of his salary would be charged to full line. I assume that they made that judgment because some people were spending close to 100 percent of their time on evaporated milk and didn't want to bother allocating the salary of [1742] particular individual salesmen. They made this judgment that anybody who spent more than 20 percent on evaporated milk would be charged half to evaporated and half to full line and there was no other kind of charge — that is, in 1956 they had discontinued the use of people who worked only on evaporated milk and whose salary and expenses were charged only to evaporated milk. That had stopped in '56.

Q Let me make sure I understand you, Mr. Daney. Now did you say that your direct expense item which is what we are now talking about, actually consists of 50 percent charge against the salaries of combination full line men?

A Fifty percent of the salaries of combination full line men charged directly to evaporated milk; yes, sir.

Q Plus the charge for Saturday store sales?

A Yes, sir.

Q That is what this item includes?

A Yes, sir; plus travel expenses.

Q Plus travel expenses?

A Yes.

Q In other words, this 50 percent charge was a

automatic one?

A Well, automatic once a man had been classified as a combination full line: 50 percent of his salary charged to evaporated milk, yes.

Q Then am I correct in understanding you that you simply [1743] took those accounting records which showed this 50 percent charge in the New York office and then put that data from those records into your cost study?

A Oh, after I checked it, sir. I have an analysis which shows that 50 percent is probably a slight understatement of the amount that should have been charged to evaporated milk.

Q That includes their medical detail work?

A Yes, sir.

* * * *

[1748] Q So let me make sure that I understand what you excluded. You excluded factory sales, government and export sales; is that correct?

A Well, government and export were not excluded as such. They had never been included in any of the other amounts that I had. I then took the amounts of sales, or the cases, and dollars shown, on Page 8 of my report — I beg your pardon, Schedule 1 of my report, and excluded from that amount the relatively minor quantity that was sold other than through The Borden Food Products Sales Department.

* * * *

[1751] Q Does your cost study distinguish between cases of Borden brand milk going through stores called on by Borden salesmen; by that I mean Borden

retail salesmen and cases going through stores not called on by Borden retail salesmen?

A No, sir, there would be no way to distinguish.

Q You said there is no way of distinguishing?

[1752] A No way I could distinguish that, no, sir.

Q Do you remember Mr. Hall's testimony that Saturday store sales were only held in the higher traffic evaporated milk stores?

A I believe I do, yes, sir. It was my general understanding you didn't conduct a Saturday store sale unless you expected to move a good quantity of evaporated milk which I think is what he essentially was saying.

Q Now, does your cost study distinguish between higher traffic evaporated milk stores where Saturday store sales were held and lower traffic evaporated milk stores where such sales were not held?

A No, sir.

* * * *

[1754] Q I infer from your previous testimony, Mr. Darcey — correct me if I am wrong — that you did not and that you are not now in a position to determine the number of cases of Borden label milk in 1957, going through the following category of stores: stores on which Borden retail salesmen did not call or where they performed no in-store service activities; and (2), where the in-store service activities of Borden retail salesmen were restricted?

A I have no such information on which I could come up with the answer; no, sir.

Q It is my further understanding from your preceding testimony, Mr. Darcey, that you made no study of and you are not in a position to make such a

study, namely, the number of cases of Borden brand milk going through stores in 1957 where Saturday evaporated milk store sales were held and through stores where such sales were not held?

A I did not make such a study. I don't know whether I could or not.

[1755] Q You don't know whether you can or not?

A I think I probably could if the information is still available. I could go back and make it but I did not.

Q Right.

Did you ever attempt to make a determination of the number of retail stores in the United States in 1957 handling Borden label milk, first, in which Borden salesmen did not perform any in-store service activities, and secondly, where their activities were restricted?

A No, sir.

* * * *

[1763] Q Mr. Darcey, I would like to direct your attention to Respondent's Exhibit 74.

Now, this exhibit lists certain salesmen who participated in the Rich Roast introduction in Florida, does it not?

A Yes, sir.

Q Now, for a number of days, these men worked exclusively on Rich Roast coffee, did they not?

A Yes, sir.

Q Were these men's salaries and travel expenses treated on Borden's books in 1957 as a full line charge against all the products handled by the company or were they handled as a direct charge against coffee for their time during that introduction?

A As I recall it, their regular salary was charged full line. The fifty dollars additional that they got for this work, I understand, was charged against coffee, but their regular salary was not charged specifically; nor were their travel expenses charged specifically to coffee.

* * * *

[1764] Q So 44 per cent of that time was charged to Borden Evaporated Milk?

A Yes, sir.

* * * *

Q Mr. Darcey, do you recall testimony in the preceding hearings that Rich Roast Coffee was introduced in areas other than Florida in 1957?

A Yes, sir.

Q Were there any men in those areas in 1957 working exclusively for a number of days on the Rich Roast exchange in those areas?

A I believe so, yes, sir; I believe they said they did.

Q How does Schedule 12 treat the salaries and expenses of those men?

A Those are included with the full line expenses and are allocated 44.0206 per cent to Evaporated Milk and the remainder not.

* * * *

[1787] REDIRECT EXAMINATION

By Mr. Lukingbeal:

* * * *

[1790] Q At page 1676 Mr. Hays asked you a couple of questions relating to what he termed the earned surplus of Premium Associates for the year 1957. Did Premium Associates, in fact, during the year or for the year 1957 have any net income after taxes?

A Yes, sir; they did.

Q Do you know about how much it was?

A As I remember it was something around \$71,000.

Q Did Premium Associates during the year 1957 render services of the same character as those rendered for Borden to companies who were not stockholders of Premium Associates?

A Yes, sir.

Q Did Premium Associates charge those non-stockholder companies at the same rate for those services as it charged Borden?

[1791] A Yes, sir.

Q Did it charge the other stockholder cooperators at the same rates that it charged Borden?

A Yes, sir.

Q Do you have any idea as to about the general proportion of Premium Associates total business in the year 1957 that was done for non-stockholder companies?

MR. HAYS:

I object, your Honor. I submit that the records of the Premium Associates are the best evidence of this and Mr. Darcey is not connected with that company as far as I know. It is a separate corporation.

MR. LUKINGBEAL:

Your Honor, I will revise the form of this question if Mr. Hays wishes to assert that particular objection.

By Mr. Lukingbeal:

Q Mr. Darcey, did you for purposes of your analysis make any effort to ascertain approximately what proportion of the total business of Premium Associates in the year 1957 was done with non-stockholder companies?

A Yes, sir.

Q And did you for purposes of your analysis and reaching your conclusions as to the proper type of analysis to make take into account any information in that regard?

A May I have that question read back, please?
(Question read.)

[1792] THE WITNESS:

Yes, sir.

By Mr. Lukingbeal:

Q And what was that information, sir?

A Well, I knew that Premium Associates conducted its operations, that is redeem coupons, for the four stockholders and also for other people and I believe I talked to various people in Borden and I also talked to Mr. Harold Karn who essentially managed the Premium Associates Company and if I remember correctly a substantial part of their business was done for companies who were not stockholders.

I think my discussion with him merely confirmed what I had learned in other ways of the Premium A

sociates operation, that is that it was a service company that redeemed coupons for Borden as well as the other stockholders and also for other people and one of the prime concerns of Premium Associates, as I think Mr. Merrill testified, was in getting additional people into the plan in an attempt to get wider distribution, that is, more stores to redeem coupons and I assume also that it would eventually reduce the cost to each of the cooperators and also to the other people who issued coupons.

Q Did you have any information as to whether there was any non-stockholder customer of Premium Associates for which the services were of the same general magnitude as those rendered for Borden?

[1793] A Well, Borden was by far, I shouldn't say by far, Borden was the largest cooperator for whom Premium Associates redeemed coupons and their proportion was somewhat more than the second largest, the second largest company for whom Premium Associates redeemed coupons was not a stockholder of Premium Associates.

Q So that there was one of the non-stockholder customers that was a bigger customer than any of the other three stockholder customers?

A Yes, sir.

Q Now, at this same page, 1676, Mr. Hays also referred to the fact that Borden was one of the stockholders of Premium Associates and he asked you whether you had taken that into consideration.

Did you, Mr. Darcey, include in your computations any amount reflecting or assigning any value to the money that Borden had put at risk by buying stock in Premium Associates?

A No, sir.

Q Did you, in your computations, include any amount reflecting the fact that during the year 1957 Premium Associates had income of \$70,000?

A No, sir.

[1794] Q Can you tell us why you included nothing reflecting either of those items?

A Well, to deal with the second part of the question first, this income of Premium Associates was their income for 1957 and the company had not paid it out in dividends for one thing so that I thought that I did not even have to face a problem.

The way Premium Associates operated there could be no assurance that the income in one year would be available for dividends after the year's operations that is they might have losses in the future; also, Borden was only a 25-per cent stockholder and would have had to persuade the other stockholders to declare dividends.

But essentially, I think, that while no company goes into business to lose money the whole idea of the Premium Associates operation was not that it was to be a money-making thing but that it was to take over the services that had been formerly rendered by the Colgate Company; the Colgate Company had gotten out of business and had persuaded Borden and the two other people to join with them in forming Premium Associates to carry on this function and it was strictly a service for the cooperators, for the stockholding cooperators, and they attempted to persuade other people to come into the plan for two reasons: to, I guess, reduce the total cost or per unit cost for **[1795]** each of the cooperators, and also so that Premium Associates could open more stores, agree

cies, and make it easier for people to redeem coupons.

For the same reason they kept trying to get more cooperators into the plan, to make it more widespread and to increase its effectiveness as a merchandising supplement to the merchandising plans of the cooperators, including the four stockholders.

As to why I did not include any cost for the amount of money that Borden had at risk, well, I do not think I could have included that without having at least partially offset it by whatever share Borden might have had in the Premium Associates earnings for 1957, but I think maybe the answer to both sides of the question is that from the way Premium Associates was set up it just did not seem to me to be appropriate to take either of those things into account.

Q You did, however, take into account and include as a cost amounts that Borden paid to Premium Associates for the services rendered by Premium Associates? Is that right?

A Oh, yes, sir, that was what Borden was paying for the services and the fact it was a stockholder really had no relation to the fact that it paid for these services, that it paid the Colgate Company for the same kind of services for many years as had the other people in the plan.

Q Did you form any view as to whether the amounts that [1796] Borden paid Premium Associates for those services reflected the arm's length or market value of those services?

A Yes, sir; very definitely.

At first talking with Mr. Karn it was obvious he had to keep in mind not only the four stockholder cooperators but also the cooperators who were not stockholders; that is, as long as they were treating everyone

on the same basis, that is, charging everyone at the same rate, they had to consider whether they were charging the outsiders an appropriate rate for the services, and, of course, they felt they were. Everyone was charged the same rate.

* * *

[1804] Q At pages 1639-41, Mr. Hays referred to Commission's Exhibits for identification 5320, 5321-A, 5321-B, 5321-C, and 5322.

I now place those documents before you, Mr. Darcey. (Handing documents to the witness.)

Mr. Hays asked you whether you had those documents before you at the time you made a certain statement in your cost report and you said that you had not seen the documents but that you had become aware of the situation that is discussed in them.

Mr. Darcey, in what way had you become aware of the **[1805]** situation discussed in those documents?

A Well, if I remember correctly, Mr. Crowe had been shown these documents and asked exactly what they meant. These series of documents related to an incident that had happened in his division, and Mr. Crowe said that this was one of those once in a life-time opportunities that the Borden Company had gotten to rearrange evaporated milk shelves which resulted in an improved position for Borden brand as opposed to Eagle and Carnation, and I think the reports that are a part of this set of documents indicate that in almost every case Borden improved its position, acquired additional shelf space, all at the expense of Pet and Carnation, and as Mr. Crowe said, these things just did not

pen very often, the stores just would not let you fool around with these things, but they had gotten this opportunity, were delighted with it, and made the most of it.

The fact that it required the salesmen and the brokers people to move private label evaporated milk did not concern him at all. He would have moved anything, is the way he put it.

The whole intent of this thing was to improve the position and shelf space of Borden brand evaporated milk at the expense of Pet and Carnation.

Q And I believe you have mentioned that that is what the documents show, in fact, resulted from the operation; [1806] is that right?

A Yes, sir; there is one letter in here which states, showing positions improved, rows gained for Borden evaporated and rows taken from our competitors in taking the rearranged milk positions.

They had taken, as he said, one of these once in a lifetime opportunities, to move the three brands of milk. One of these was Borden's evaporated milk and the salesmen said Borden was the only milk that was going to gain in that operation.

Q Did you discuss with Mr. Crowe whether he would have been happy to have that opportunity if the private label milk that was also involved had been manufactured by somebody other than Borden?

A He would not have cared whether it was evaporated milk at all. The important thing was they had the opportunity to work on Borden, Pet and Carnation evaporated milk and the fact that they had to move some private label evaporated milk was, of course, part of the job and they would not have been allowed

to rearrange the shelf without doing that in this case but as he said, he would have moved peas, tomatoes, coffee, anything.

Q Manufactured by anybody?

A By anybody. I guess he would have moved them around if he had to.

【1807】 Q Mr. Darcey, yesterday Mr. Von Brandt in his questioning of you referred to certain instances where full line salesmen were engaged for particular periods of time on work relating to Rich Roast coffee and where the Borden Company in its records and your report have included that time and related expenses as a full line charge, that is to say, one of the charges which you have allocated on a dollar sales basis.

Did you in the course of preparing your cost analysis know of any instance where full line salesmen were in fact, spending all of their time on the Borden brand evaporated milk?

A Yes, sir.

Q What instance or instances do you have in mind?

A Well, there were two kinds of instances and the first one, of course, would be the crew work which was mentioned by Mr. Leary which I believe he said took place in Minnesota or that general area, and I think he said that that was done twice in 1957, once in the spring and once in the fall.

Mr. Crowe mentioned similar work done, I forgot the name of the town, but some place in Louisiana during 1957.

The other instances where salesmen worked only on evaporated milk but where their salary was included as a full line charge would be the store preparation work [1808] done on Thursdays and Fridays for a Saturday store sale, and also the work done on Mondays in restoring displays after the weekend store sale had been conducted.

The company treated all of those as full line even though the division and district managers and general sales manager knew that these people at those periods of time were working on only Borden brand evaporated milk.

It became to them, I guess, a question of how fine to try to split these salaries since the salesmen were not turning in detailed time reports each day.

Also, I think in another connection I said to Mr. Von Brand that the company had made a decision as to combination full line people, that if they spent more than 20 per cent of their time only on evaporated milk that they would be classified as combination full line.

Therefore, anyone who spent less than 20 per cent of his time only on evaporated milk work as opposed to full line work which, of course, would include evaporated milk, would be included only as a full line charge and, therefore, the charge to Borden brand evaporated milk to that extent would have been understated, in the same way that perhaps the charge to Rich Roast would have been understated.

To sum up, Mr. Lukingbeal, I think that the indications on this crew work and this special store work

[1809] on evaporated milk on Fridays and Mondays and the medical detail work done by full line salesmen and this coffee introduction and the hot chocolate introduction in a few markets, all of these things were just bits and pieces of what had happened during the entire year and it would have been wonderful if we could have allocated the entire year of the salesman's time among products but we could not.

We found only these few instances and it would have seemed to me that — it seemed to me in my judgment that we just could not allocate these portions of the time on the basis of what information we had and then allocate the rest of their time on some other kind of basis.

What I am trying to say, I guess, is that their time as a whole for the year was what I considered and I determined that the dollar sales allocation was the best measure in lieu of — under all the circumstances to allocate their time.

You just could not allocate bits and pieces and use the entire annual sales total to allocate the rest, you have a distortion in there in that you could not tell how much of this special time on any one product had resulted in sales of that product.

Q Did you form any view as to whether your inability to make a specific charge with respect to each hour of **[1810]** each salesman's time throughout the entire year had a significant effect on the overall fairness of the conclusions that you reached?

A No, sir —

MR. HAYS:

Objection, that is a point that the Examiner will decide, whether it is right, fair or proper.

HEARING EXAMINER LIPSCOMB:

He has already answered No, I believe.

MR. HAYS:

If he did, I did not hear him.

[1811] HEARING EXAMINER LIPSCOMB:

Did you not answer No?

THE WITNESS:

I started to answer.

HEARING EXAMINER LIPSCOMB:

Would you read the question, please?

(Question and answer read.)

HEARING EXAMINER LIPSCOMB:

Let the answer stand.

THE WITNESS:

I don't think that is right, your Honor —

MR. HAYS:

Suits me.

HEARING EXAMINER LIPSCOMB:

I thought that was your answer.

MR. LUKINGBEAL:

He wanted to add more, sir, and I do believe that standing alone is not what he intends to answer.

MR. HAYS:

We will be glad to let it stand.

HEARING EXAMINER LIPSCOMB:

Answer fully as you wish.

THE WITNESS:

May I have the question?

(Question read.)

THE WITNESS:

Yes, sir.

By Mr. Lukingbeal:

Q What was that view, sir?

A My view was that in view of everything that I had learned from my discussions with the various people in the sales department and with Mr. Berry, from all of the [1812] documents that I had seen at various times in this case that, as I said in my report, the allocation on the basis of sales dollars of the sales department expense to Borden brand evaporated milk was conservative.

* * * *

[1822]

RECROSS-EXAMINATION

By Mr. Hays:

Q Mr. Darcey, I show you Respondent's exhibit for identification 86 and direct your attention to the legend thereon, "number of sales reported."

What does that mean?

(Handing documents to the witness.)

A As I remember that the number of sales reported, Mr. Hays, means either the number of stores to

which sales were made from the salesman's car which would be a relatively minor amount of the total, and also the orders which the salesman took at each store and which he passed on to the wholesaler with which that store did business.

Q In other words, these figures appearing under the columns "Number of sales reported," would refer to the instances in which the field force made sales to the stores that they called; is that right?

A No, sir.

Q It would include that, would it not?

A Yes, sir.

Q It would include also orders taken?

A Yes, sir.

Q Now, a substantially large number of sales were made [1813] not through this field force but through other channels to these same stores; is that right?

A Most of the sales were made not by this field force as such, the field force, as I think I have said, were promotion and merchandising people. The sales were made through the normal channels.

Q We have been referring to them loosely as salesmen through the course of your testimony.

Actually they are promotional men that do very little selling, isn't that true?

A Well, the company calls them retail salesmen; I think in our report we used the words "field representatives" which is perhaps more innocuous and I don't really think they were salesmen in the ordinary sense. They are promotion and merchandising people; yes, sir.

* * * *

[1835] Whereupon,

HERBERT F. TAGGART
was called as a witness for the Respondent and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

Q Doctor, I hand you a sheet of paper and ask you if you can tell us what that is, please, sir?

(Handing document to the witness.)

A This is a copy of some material prepared by me of a biographical nature.

MR. LUKINGBEAL:

May we have that copied into the transcript?

HEARING EXAMINER LIPSCOMB:

It may be copied into the transcript.

(The material referred to follows:)

Herbert F. Taggart,
1945 Cambridge Road
Ann Arbor, Michigan
Professor of Accounting, University of Michigan
Formerly Assistant Dean, School of Business Administration, University of Michigan
Ph.D., University of Michigan, 1928
CPA, Michigan.

[1836] Taught accounting at University of Kansas

and University of California, Berkeley, as well as at the University of Michigan. Lectured also at George Washington University and Harvard University.

Taught courses in economics and in principles and theory of accounting, auditing, governmental accounting, and other special fields, but principal field is cost accounting, with special emphasis on distribution costs, in which a course has been taught regularly since about 1932.

Governmental positions (while on leave from the University of Michigan):

Chief, Cost Accounting, Unit, Research and Planning Division, National Recovery Administration, 1933-35.

Consultant on Distribution Cost, U. S. Department of Commerce, 1938.

Assistant Administrator and Director of Accounting, Office of Price Administration and predecessor organizations, 1940-43.

Chief, Contract Termination Section, Office of Fiscal Director, Army of the United States, 1943-46 (Major and Lt. Colonel).

Chairman, Advisory Committee on Cost Justification, Federal Trade Commission 1953-56.

[1837] Consultant to Economic Cooperation Administration and other government departments.

Author of the following:

Minimum prices under the NRA, 1936.

The Cost Principle in Minimum Price Regulation, 1938.

Distribution Cost Accounting for Wholesalers, 1939.

Cost Justification, 1959.

Numerous articles in professional journals, many of them having to do with distribution costs and the Robinson-Patman Act and especially an article in the NACA Bulletin for October 15, 1939, entitled "The Standard Brands Case."

Specialized public accounting practice consisting mainly of consultation with companies relating to cost and price matters, with particular relation to price differentiation plans. Consultation and expert testimony in a number of Robinson-Patman cases, notably the Standard Oil (Indiana) case (on the government side), the Sylvania Electric Products case, and the Russellville Canning Co. v. American Can Co. case in a federal district court.

Member of:

American Institute of Certified Public Accountants.

[1838] Michigan Association of Certified Public Accountants.

American Accounting Association (President, 1942).

National Association of Accountants (President, Washington Chapter, 1945-46 and National Director 1947-1948).

Controllers Institute of America (associate member).

By Mr. Lukingbeal:

Q Doctor, for about how many years of your professional career would you say that cost accounting has been one of your principal interests?

A I should say roughly since about 1927 or 1928. This would be 32-odd years.

Q I notice you have among your publications here several items which from their titles would appear to have to do with costs. You mention one here in 1938, "The Cost Principle in minimum price regulation."

Does that have anything to do with distribution costs?

A It certainly did.

Q And you have a 1939 publication "Distribution Cost Accounting for Wholesalers." Was that an article or a book or what, sir?

A Well, that was what we called a pamphlet, I think, [1839] it ran about 80 pages, published by the Department of Commerce as a result of research project which I undertook for them mainly during the spring of 1938.

Q You mention here that you were chairman of the Advisory Committee on Cost Justification of the Federal Trade Commission, 1953 to 1956. Would you tell

us very briefly how that committee came to be set up and what was the nature of its activity?

A This committee was appointed by former Chairman Howrey of the Commission in the fall of 1953. It consisted of seven individuals who performed their services on the committee without compensation. Its deliberations proceeded over a period of something under two and a half years, as I recall, and the report of the committee was submitted to the Commission in, I believe, March of 1956.

Q What is the general subject matter and scope of the report, Doctor?

A We were asked by the then Chairman to explore the subject of cost differentiation, if you can coin a phrase, that is the general problem of determining cost differentials with specific reference to the requirements of the Robinson-Patman Act, and to determine whether it was possible to devise rules or principles with respect to such exercises that would be useful both to the Commission and in particular Mr. Howrey was interested in rules that might be useful to [1840] industries generally in contemplating these problems. It was his hope that our report would serve to (a) stimulate interest in the subject which he felt had been perhaps not as thoroughly explored as it should be; and (b) make it possible for industries to make an attempt within their own housekeeping arrangements, to work out account classifications, accounting procedures, allocation methods, and so on; record keeping systems, both financial records and statistical records, in such a way that answers to cost justification would be facilitated if and when such answers needed to be produced.

Q Was the report made available to the public generally?

A Yes, it was.

Q By the Trade Commission?

A That is correct.

Q Dr. Taggart, you also have among your publications an item called "Cost Justification," published in 1959.

Is that a book or an article, or what?

A This was a book that ran some nearly 600 pages devoted principally to a very detailed explanation or survey of all of the public records with respect to the cost justification defense as it has been presented either before the commission or before the Federal courts.

Q In general how did you go about getting together the information that went into that book, how much time did you spend at it, and so on?

[1841] A I should hate to estimate the amount of time. Actually the inception of this book took place at least as early as 1939 at which time I studied in very considerable detail the record in the first major cost justification case which came before the Commission under the Act, namely the Standard Brands case.

At that time I wrote an article which was published in the Bulletin of the National Association of Cost Accountants, in the fall of 1939, entitled "The Standard Brands Case."

This article dealt also, incidentally, with the Bird Floor Covering case, which had been a relatively minor preceding cost justification case.

From that time forward I had made efforts to keep in touch with the cost justification problem and at va-

rious times through all those years I accumulated everything that was published, for example, as far as I was able to in the form of reports, speeches and comments by accountants and lawyers and others concerning this problem, and at certain times through the fact that professors have time off for research purposes, I was able to come to Washington and explore in great detail the public files downstairs here.

Specifically I recall the fall of 1952 at which time I was on Sabbatical leave from the University and I spent [1842] that entire fall semester here working on this. And there was time spent in summers, too, incidentally, on various occasions.

Then in the school year 1956-1957, in fact, for 12 months beginning September 1, 1956 through August 31, 1957, the Ford Foundation provided to the University funds which enabled me to be relieved of teaching duties and to spend full time on this project. Part of that time I spent again here in Washington digging through these files, the transcripts of evidence, the exhibits, the briefs, the Commission's decisions, anything else I could lay my hands on, and a considerable part of that time I spent in writing the book.

Now, obviously I did not get the book finished by September 1, 1957, so that a very large part of my time, spare time, I was able to squeeze out from my teaching and administrative duties in the following, well nearly two years, were devoted to this writing project.

* * * *

[1844] Q Doctor, I believe you have been present at our hearings in this case throughout the testimony of Mr. Darcey; is that right?

A That is right.

Q I recall that Mr. Hays in cross-examining Mr. Darcey at one time seemed to make some point of the fact that Mr. Darcey had not previously had experience in a Robinson- **[1845]** Patman Act cost justification case.

Of course, your statement of background makes it quite clear that that comment would not be applicable in your case; also, Doctor, I take it that your professional experience in the accounting field has included the general kind of cost accounting problems that businessmen face in the regular course of business; is that right, sir?

A Yes, this is correct.

Q Well, now, Doctor, what would you say is the difference between cost accounting for the purposes of the Robinson-Patman Act and cost accounting for just general business purposes?

A I think it is largely a matter of aim, largely a matter of the purpose for which the costs are prepared.

All cost accounting has this same characteristic, as a matter of fact; that is costs are prepared for all kinds of purposes. They are not prepared for merely some one purpose such as ascertaining the costs of product, for instance; they are prepared for many purposes; primarily for management purposes.

But in the case of the so-called Robinson-Patman Accounting the difference is largely one of what might be called degree or detail; that is a great deal of very detailed study of certain cost items with a particular

view in mind is necessary in these cases which is normally not necessary [1846] for ordinary managerial decisions.

This does not mean that the studies are of a different kind at all, it is not a different character; it is not something that no one has ever carried on before, even one who has never indulged in Robinson-Patman accounting. It is merely an extension of the ordinary procedures which any experienced accountant has carried on many times in aiming a cost study or a cost analysis at the solution of a particular problem.

For this purpose he marshals the costs that are appropriate, he determines what functions are involved; he finds out where the information is which is necessary to be used in order to make the necessary allocations and proceeds to do the job.

This is essentially what happens in Robinson-Patman cases.

Q Dr. Taggart, do you remember approximately when you were first consulted with respect to this present Borden Company matter?

A Some time in January of 1959.

Q I believe Mr. Darcey has testified that he started on this project along in late June 1959.

Was he present when you were first consulted about the matter?

A No; he was not.

[1847] Q What would you say was the general nature of the early discussion that you had with respect to this case?

A Well, the first discussion I had consisted of a meeting in New York with company personnel and personnel from your office simply discussing the prob-

lem or problems presented; discussing the character of information that had been presented to the Federal Trade Commission investigators at some earlier time; attempting to decide whether that information perhaps somewhat refined or different information might be useful in presenting the cost justification defense; discussing in a rather general and preliminary way at that time the operational organization and setup of the company so that I could have a reasonably clear picture of the kinds of costs which might be involved in any such study; and things of that rather general nature.

Q Was there any discussion about how much of a project a cost study in these circumstances might be; how long it might take, how many men, and so on?

A There was discussion of that, yes; and my recollection is I was unable to give the company very much comfort on this point, because it seemed quite obvious that a considerable amount of work would be necessary and as it developed of course, I underestimated the amount rather than overestimated it.

Q Do you recall, Doctor, about when you first met [1848] Mr. Darcey?

A Well, this was after he had been assigned to the job. I should say perhaps early in July of 1959.

I am sure I was in New York at that time and I am almost certain that I visited with Mr. Darcey; in fact, I am sure I did, rather extensively at that time.

Q What was the general character of the discussion with Mr. Darcey at that stage?

A Well, of course, he had scarcely gotten his feet wet in the problem at that point, he, of course, had a very considerable background, however, in the Borden

Company, and he understood their financial and accounting setup and to a very considerable extent their operating setup, perhaps not as well as if he had been a Borden employee, but very close to it, through the fact that he had been in charge of their audit.

So that, even at that time, while he had not had an opportunity to explore with any degree of thoroughness what was involved he did not need to be told that certain records would have to be worked on and in a general way what the problems were.

We did discuss in some degree of detail at that time the things he would probably run into, the particular items of cost and so on, which would probably be particularly or particularly crucial in making the study.

* * * *

[1850] Q Now, Doctor, I believe you attended the hearings in this matter that were held in December of 1959 at which Mr. Berry and Mr. Darcey testified; is that right, sir?

A That is correct.

Q And is that also true with respect to the hearings in this matter that were held in May of this year at which the division managers and Mr. Hall, as well as Mr. Darcey, testified?

[1851] A Right.

Q I believe also that you have read the transcript of Mr. Berry's testimony given in this case prior to December of 1959; is that right, sir?

A Yes, I have.

Q And what about the testimony of Mr. Steele?

A Yes, I read that.

Q Now, in conjunction with the preparation for the testimony of Mr. Berry in December of 1959, did you participate in consultation with Mr. Berry?

A Yes; I met with you and Mr. Berry and other gentlemen, including Mr. Darcey, prior to the hearings and we discussed —

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

THE WITNESS:

We discussed the nature of the testimony Mr. Berry was going to give and in general the organization and problems of the evaporated milk business.

Q And prior to the hearings in May of this year at which the division managers testified did you also participate in conferences with those gentlemen?

A I did, yes, prior to the hearings I met all of those gentlemen, we sat around the table and discussed considerable numbers of matters, some of which were the subject of their testimony at that time.

[1852] Q And, of course, you have been present at the hearings in these current sessions yesterday and today?

A That is correct.

Q Now, going back to your relationship with Mr. Darcey in connection with this cost study with regard

to which he has been testifying you said that you had a meeting with him along in July of 1959 at which time he was in the very early stages of his work.

Did you thereafter have further discussions with Mr. Darcey?

A Yes, I did. I was in New York again in, I think I was in New York at least twice in July and again in September, October, along in there sometime.

I have forgotten the precise dates or numbers of those meetings, but I also discussed with Mr. Darcey over the phone some things, as a matter of fact, as he was working along if I remember correctly.

Q Did you discuss with Mr. Darcey any drafts of the report that he submitted in this matter on December 4, 1959?

A Yes, I did. I saw various drafts, these were — some of them at least sent to me at home, and these I reviewed and commented on and gave Mr. Darcey the benefit of whatever advice I could.

Q I take it that in the course of your work with Mr. Darcey you did not endeavor to check the accuracy of his computations [1853] as such, is that right?

A Oh, not at all, no.

Q Now, aside from that matter of mathematical accuracy of the computations, did Mr. Darcey's report as he submitted it on December 4, 1959, meet with your approval?

A Yes, it did.

Q And I assume you were informed as to the changes thereafter made by Mr. Darcey aggregating something of the order of one cent a case; is that right, sir?

A That is true; those have been discussed with Mr.

Darcey.

Q And did the report as modified in those minor respects by Mr. Darcey and submitted h e r e as respondent's Exhibit 76 also have your approval?

A It did.

* * * *

[1855] Q Doctor, Mr. Hays also in the course of his cross-examination of Mr. Darcey referred to a number of different aspects of the matter where at least it was my impression that Mr. Hays was endeavoring to point out that from some standpoints, at least, some further sub groupings of the data might h a v e been worked out.

For example, it was pointed out that not all of the Borden brand evaporated milk went through the factory relief warehouses. It was pointed out that not all of the Borden brand evaporated milk went through the consignment warehouses. It was pointed out, especially by Mr. Von Brand yesterday, that the in-store work of the Borden retail salesmen was not performed in all of its stores, where the Borden brand evaporated milk was handled, there were some chain stores where that work was not done and also there were some of the smaller retail outlets where that work was not done.

[1856] Mr. Von Brand pointed out that the Saturday store sales were not conducted in all of the stores, that is the ones in which Borden Brand evaporated milk was handled. He pointed out that the activities necessary to handle the evaporated milk business in the hospitals differed in nature in some respects from the activities that were carried on in the retail outlets.

Now, Dr. Taggart, did you, in the course of your work with Mr. Darcey, consider the propriety of making subgroupings or analyses of the data along any of those lines?

MR. HAYS:

Objection, your Honor.

I want to make this point about this questioning: If the propriety involved in the question is propriety in so far as accounting principles is generally concerned, I have no objection, but if the propriety here involved is one of legal conclusion, that is propriety for purposes of defense in a Robinson-Patman Act case, I do object on the ground that as a proper defense this is a legal conclusion.

This witness is not qualified as a lawyer, I don't think his opinion can usurp the function of the hearing examiner or the Commission in this area, and I object respectfully but with all possible vigor to any interpretation of that question as going to the legal conclusion of the adequacy or propriety of the accounting as proper defense accounting in a Robinson-Patman Act case.

[1857] MR. LUKINGBEAL:

Well, your Honor, of course, all I have asked yet whether he gave any consideration to it, but I will right ahead and address myself to Mr. Hays' remark.

It is, of course, not our position that we can produce any witness here to take over the function of the hearing examiner in reaching the legal conclusions that will be required on these matters. However, Dr. Taggart has qualified here as an expert accountant, p

ticularly with reference to the kinds of accounting problems that arise in Robinson-Patman Act cost justification cases.

And I respectfully submit, your Honor, that his views on those questions to be given whatever weight your Honor may think appropriate in view of his background and qualifications are relevant in this case and that the respondent is entitled to have them presented to you.

HEARING EXAMINER LIPSCOMB:

I don't believe Mr. Hays objects to that.

Do you, Mr. Hays? Did you follow his statement? So long as he is testifying to accounting principles?

MR. HAYS:

As long as he is testifying to accounting principles and what is a proper accounting principle, and only that, I have no objection in that area, but I do object to the implication or the interpretation that may be in the question that this witness testifying as to propriety [1858] is testifying to propriety as a proper accounting principle in a cost justification defense in this case. That is what I am objecting to.

He can testify to the facts of accounting, what was done, but whether or not the theory is proper in a Robinson-Patman Act defense is a legal question and an exclusive legal question.

I object to that end of it with all possible vigor.

HEARING EXAMINER LIPSCOMB:

Well, Mr. Hays, we will sustain you to the extent that a question calls for a legal conclusion. I don't re-

call the question that was put. Is it asking the reporter too much to read the question?

(Question read.)

HEARING EXAMINER LIPSCOMB:

I see nothing in that question that calls for a legal conclusion yet unless you wish to point out to me.

MR. HAYS:

If propriety means proper from an accounting point of view, proper from the point of view of someone in some other company or proper from the point of view of the totals insofar as gross national product is concerned, the question is what is that propriety limited to? If it is limited to just accounting principles and good, but insofar as it goes or may go or may [1859] interpreted to go to a legal conclusion as to what is proper in this case, I object.

HEARING EXAMINER LIPSCOMB:

We will insert this qualification, that this question shall not include legal qualifications or an opinion as to the legal propriety.

MR. HAYS:

Very well, your Honor.

Thank you.

MR. LUKINGBEAL:

Do you have an answer?

THE WITNESS:

The answer is Yes.

By Mr. Lukingbeal:

Q And what was the nature of the views you formed on that subject?

A Well, we considered the fact, we considered all of these variations procedures and the use of personnel and so on, all these things that you outlined here, and came to the conclusion that the evaporated milk business for purposes of this study was essentially an indivisible whole in effect as is perfectly obvious that in any line of business, it does not cost exactly the same amount to sell to every customer; the different methods are used to some degree, that is methods in the sense of utilizing personnel in different ways, for example, to reach customers of different classes and sizes and characters whose economic status or geographic locality or otherwise may demand different treatment and it seemed to me that we had here [1860] exactly this kind of situation where essentially Borden is attempting to sell evaporated milk to an assorted group of customers by all methods that seemed appropriate and it would be wholly inappropriate to attempt to break down for the purposes of this study those customers into any such subgroups as you have mentioned.

Q I take it you agreed with and approved the type of grouping that Mr. Darcey employed, that is to say, the Borden brand on the one side and the private label on the other; is that right, sir?

MR. HAYS:

Your Honor, may we have the same understanding that this line of questioning is objectionable insofar as it relates to any legal conclusion?

HEARING EXAMINER LIPSCOMB:

We may.

MR. HAYS:

I don't have to restate that each time, I take it?

HEARING EXAMINER LIPSCOMB:

If you wish to you may occasionally restate it if you think we have forgotten it, but we will instruct the witness to regard the questions as addressed to his high qualifications as an accountant and not as a lawyer.

THE WITNESS:

Would you mind reading that question?
(Question read.)

THE WITNESS:

Yes, I did. This grouping, it [1861] seemed to me, was necessary in order to present the clearest picture of what the cost situation was.

By Mr. Lukingbeal:

Q Now, in that connection, Doctor, you will recall that in the tabulations t h a t were prepared by Mr. Steele and with regard to which he testified in this case, he had presented data with respect to individual transactions. I believe that was true particularly from the standpoint of the freight costs incurred. Have you formed any v i e w as to the propriety of analyzing

freight costs on a transaction by transaction basis for purposes of the cost justification that we are talking about here?

A Yes.

Q And what is that view, sir?

A I don't think it is appropriate at all. I don't think it gives an adequate picture of what actually went on, that is, how Borden actually carried on the business.

Q In that connection, Doctor, I show you Respondent's Exhibit 77-A and 77-B, which exhibit is entitled "1957 shipments into brokerage districts (including quantities shipped from reserve warehouses) of Borden brand evaporated milk showing percentage of total shipments by producing plants."

In connection with the question I had just asked you about analysis of freight costs on an individual transaction [1862] basis I ask you whether you gave any consideration to the information appearing on this exhibit?

(Handing document to the witness.)

A Yes, I did.

Q What sort of consideration?

A Well, this exhibit shows, for example, that by and large the brokerage districts receive their Borden brand evaporated milk not from one particular plant, so that substantially every transaction in a district could be said to carry with it a specific freight cost from some one producing plant, but instead these districts receive their milk from many plants, frequently from four, I see one here that receives it from five different plants — no, six; and so on.

Take Albany, New York, as an excellent example.

The closest plant to Albany, as I understand it, is

Wellsboro, Pennsylvania. One might suppose that Albany's milk would come mostly from Wellsboro. Actually, more than half of Albany's milk comes from New London, Wisconsin, which is a much greater distance away and presumably carries a considerably higher freight cost. Albany got only one-sixth of its total volume of milk from the nearest shipping point. It got milk also from Perrinton, Michigan, and from Dixon, Illinois, as well as New London, which supplied 52 percent of Albany's needs.

【1863】 Now, it would be impossible, in my estimation, therefore, to portray by means of a sampling of individual transactions, unless the sample was tremendously large, what the freight picture alone was in doing business with any particular district with very limited number of exceptions.

Q Now, Doctor, you are familiar with the testimony of Mr. Berry with respect to the various situations that in Mr. Berry's view made it impossible for Borden to set up the business so that any given locality could be continuously served out of any given plant. He referred to a large number of different factors that came along from time to time that prevented any such precise planning and conduct of the business.

In the light of Mr. Berry's testimony as to the types of business problems that were involved, is the type of result shown on Respondent's Exhibit 77-A and 77-B the sort of thing that you would expect?

A Yes, it is.

Q Dr. Taggart, do you know of any instance in which the Federal Trade Commission has not permitted some grouping of transactions for purposes of a Robinson-Patman Act cost defense?

A I know of no such instance.

Q Would you say that the grouping of transactions has [1864] been the universal practice in the Commission's cases on that subject?

A This is certainly true.

* * * *

[1869] Q Doctor, would you turn, please, to Schedule 9 in Mr. Darcey's report?

That schedule is headed "Investment in Accounts Receivable and Inventory."

I take it from your previous testimony, Doctor, that you approved the inclusion in this analysis of amounts reflecting investments of those two types; is that correct, sir?

A That is correct.

Q That is to say, accounts receivable on the one hand and inventory on the other; is that right?

A That is right.

Q Well, Doctor, directing yourself first to the investment in inventory would you tell us the principal aspects of your thinking on that subject?

[1870] A Well, the Borden books as reviewed by Mr. Darcey showed that the average inventory investment in the Borden Brand evaporated milk was substantially in excess of the average inventory investment in the private label evaporated milk.

This being the case, it was quite obvious that Borden had a considerable amount of capital tied up in Borden brand inventory which was not tied up in private label inventory.

Q Tell me, Doctor, I assume that you are speaking here on a per case basis, that is when you say they had a greater amount tied up in Borden brand, you mean a greater amount per case of Borden brand business; is that right, sir?

A Well, yes, this is true without any question.

Now, there is a cost to Borden of any such investment, there is a cost to any company in any investment that it makes in any of its facilities, any of its assets, which no business man can overlook and this investment cost that we are talking about here is essentially an attempt to set forth that item as respects the particular situation we have here.

Q Well, now, Doctor, for purposes of ordinary cost accounting for management purposes, is it customary, in your view, to include an element reflecting the cost of capital tied up in any given operation?

[1871] A It is not customary but it is by no means unheard of.

Q What would you say are the elements that enter into the consideration of t h a t subject from the standpoint of cost accounting done for regular management purposes?

A For many management purposes t h i s investment cost does not present a problem that needs to be evaluated and for such management purposes, therefore, this particular cost is ignored.

This is true of any kind of cost.

In making management decisions the costs which are taken into account are the costs which, for presumably good reason, at least good in the sight of management, are appropriate for making t h e decision. That is what might be called the conduct influencing

costs, the costs which led to proper conclusions.

So, that for some purposes certain costs are ignored and for other purposes other costs are ignored, and the cost of investment is one of the costs which is frequently ignored simply because it is not conduct determining in the sense in which I am speaking.

Now, where it may influence policy, where it may influence management decisions, it is taken into account.

It does become a part of the cost accounting statements, reports, exhibits, which the management [1872] of a company looks at in attempting to make up its mind as to certain courses of conduct.

[1873] Q From the standpoint of whether the costs of investment in inventory is or is not a true cost in an economic sense, does that turn in any way on whether in any given situation it does or does not happen to be included in an analysis?

A Not at all.

Q Have you a view as to whether regardless of whether it's included in a particular cost analysis the cost of the investment in inventory is a true cost?

A It certainly is.

* * * *

[1877] Q Doctor, you have also heard the testimony to the effect that Mr. Darcey in those instances where the company had charged a retail salesman's time as part of the full line work used that same charge and also that Mr. Darcey did not go behind that and isolate out for special treatment as direct charges to particular products either the particular days t h a t were

spent by some full line people on Richroast Coffee [1878] or the particular days that were spent by some full line people on special crew work on Borden brand evaporated milk and other Borden brand evap activities.

Did you approve of Mr. Darcey's procedures in those regards?

A I certainly did.

Q Well, what's your reason as to why he shouldn't have gone behind the company accounting in those respects and put in some direct charges in the regards I have mentioned?

A I think the most obvious reason is that he couldn't have. The records of the salesmen's activities throughout the year were, as he pointed out this morning, not in sufficient detail so that it was feasible to find all the instances in which salesmen had devoted their full attention to any one product, be it evap or any other product.

Q Well, doctor, I don't mean to argue with you, but maybe he couldn't find them all, but you do understand that we have in the record here specific information as to numbers of men and number of days, both on the Richroast and on the special crew work on the evap that I have mentioned.

Now, why couldn't he at least isolate those out of the general?

A The difficulty of doing that is that this kind of thing should be done only on a total basis if it's to be done at all. In other words, you can't step into a situation of this [1879] sort and pick out individual instances of the kinds you mention and be at all sure that the final results you arrive at was any better than the re-

sult that Mr. Darcey arrived at by the method which he used.

As a matter of fact, my guess is that the method that he arrived at is probably substantially better than a method which would go at this thing on a bits and pieces basis without adequate and full information. The hundred percent work of the retail representatives on evap, for example, was by no means confined to this crew work and whatever the other illustration was that you used.

We have had testimony here that they spent, many of them spent Friday afternoons, for example, on evap in the stores where Saturday sales were to take place the next day. Now, we know that they did this, we do not know how many of them did this or on how many Friday afternoons.

Now, this is simply an example of the situation where it would be wholly unrealistic to assume that because you had found a few instances of this sort and had dug those few instances out of the general picture that somehow or other you were improving the allocation that you finally get by Mr. Darcey's method.

Q Well, now, did you approve the dollar sales allocation method Mr. Darcey used?

A I did.

[1880] Q He came out on that method with 44 percent and a fraction which he charged to the Borden brand evaporated milk. Do you understand that to mean or to indicate that 44 percent of each individual salesman's time was spent on Borden brand evaporated milk?

A Oh, not at all. This is an average, of course, and like all averages it's not necessarily applicable to any

individual member of the universe. It would be like the average weight of the people in this room, for example. You could easily compute this if we had a scale handy. It would be a meaningless figure as far as you are concerned or as far as any individual is concerned, although it's a useful, representative figure for certain purposes and entirely valid if properly understood.

Now, similarly, with this 44 percent this can be a wholly valid figure without necessarily being valid for each individual person or each individual activity represented in the schedule of costs to which it applies.

Q Nor, I take it, for each particular day of each individual's activity?

A Or each individual hour of each day, for that matter.

Q Well, from the fact that you say you approved Mr. Darcey's use of the dollar sales allocation method I take it that you are saying that merely because you are unable in a particular situation to get precise details as to each facet of the matter you don't simply throw up your hands and say [1881] there's no answer; is that right?

A That's certainly true.

Q And this dollar sales allocation method, I take it, is in your view an acceptable and proper accounting procedure to apply in facts of the kind presented here; is that right?

A That is correct.

* * * *

【1973】 Whereupon,

EDWARD M. DARCEY

was called as a witness for the Respondent and, having been previously sworn, testified as follows:

DIRECT EXAMINATION

MR. LUKINGBEAL:

May I have this marked, sir, as Respondent's Exhibit for identification?

HEARING EXAMINER LIPSCOMB:

It is No. 87.

(The document referred to was marked Respondent's Exhibit No. 87 for identification.)

By Mr. Lukingbeal:

Q Mr. Darcey, I show you Respondent's Exhibit 87 for 【1974】 identification and ask you whether that is a document prepared under your supervision at my request?

A Yes, sir, it is.

Q Are you prepared to say whether that document accurately states the items of information which are described on the document?

A Yes, sir.

Q In the note immediately under the heading of the document, it is indicated that the document encompasses information about evaporated milk handlers listed in paragraphs 1 through 5 of Commission's Ex-

hibit 5296.

I might explain very briefly, Mr. Hearing Examiner, that exhibit is a stipulation of counsel which took the various handlers of evaporated milk that were referred to in Mr. Steele's tabulations and indicated whether they were wholesalers or retailers or fell into some other category in the distribution system.

I take it, then, Mr. Darcey, that after excluding the handlers listed in that commission's exhibit who began purchasing Borden packed private label after December 1, 1957, you then addressed yourself to the remaining names in that exhibit, is that right, sir?

A Yes, sir.

* * * *

[2269] Thereupon,

RAYMOND POWERS

was called as a witness for Respondent and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Lukingbeal:

Q Mr. Powers, will you state your full name and your home address please, sir?

A Raymond Powers, Scarsdale, New York.

Q Mr. Powers, what is your present position with the Borden **[2270]** Company?

A Director of Quality Control for the Borden Food Company.

Q Does that include evaporated milk operation, sir?

A Yes.

Q What is your educational background, sir?

A I graduated from the University of Minnesota in 1931 with a Bachelor of Science degree in Agriculture Science.

Q When did you first come with the Borden Company?

A In August of 1931.

* * * *

[2287] Q Mr. Powers, there has been some reference in this proceeding to fat separation as something that happens to evaporated milk in the can. What is that?

A That is one of the faults of storage. It happens as evaporated milk ages if it is stored at too high a temperature. The tendency of fat to rise up through the milk to the top of the can increases with storage temperature. It occurs with age. It can also be a fault in the manufacture if the homogenization is not done correctly or efficiently. It is an undesirable characteristic because unless the can of evaporated milk is turned over so that the fat will go the other way, it gets hard if it stays on top of the milk for a period of time and then when the housewife opens the can of milk, these little lumps of fat come out and she thinks it is curdled or thinks it is sour or that there is something very much wrong with it.

Q Suppose that the process hasn't gone on long enough for the fat to have turned hard, it is just there

in the top of the can but still in a gooey sort of state, what does the housewife tell you is wrong with it when she opens that can?

[2288] A It is almost as bad because she says it is stringy. I have known of instances where they say it is ropy, but it doesn't pour like a nice fluid evaporated milk or light cream should pour. It comes out in sort of strings.

Q You mentioned something a b o u t mineral salt separation. Is t h a t something else that happens in storage?

A Yes, that is another thing that comes with age of the evaporated milk. Some of the minerals, mostly calcium citrate, come out in small white particles like salt out of a salt cellar and they are insoluble. They don't dissolve and they collect at the bottom of a can and outside of looking bad, sometimes if the milk is used in the baby's formula, they get into the formula and get into the nipple and then you have a complaint.

Q What about the color of evaporated milk. Is there any tendency for the color to change with storage?

A Yes, evaporated milk color darkens on storage. It darkens faster if the temperature is fairly high due to what is known as a browning reaction which is a reaction between protein and C-6 sugars.

Q This browning reaction is t h e tendency of the milk to turn brownish, is that right?

A That is right, tan color.

* * * *

[2405] Whereupon,

MELBOURNE C. STEELE

was recalled as a witness for the Commission, and having previously been sworn, was examined and testified further as follows:

DIRECT EXAMINATION (resumed)

By Mr. Hays:

Q State your full name, please.

A Melbourne C. Steele.

Q What is your home address?

A 7404 Bybrooklane, Chevy Chase, Maryland.

Q Will you tell us where you are presently employed?

A Federal Trade Commission.

Q In what capacity are you employed by the Federal Trade Commission?

A I am the assistant chief accountant of the Accounting Division of the Bureau of Investigation.

Q Will you tell us something of your educational background?

A I attended the University of Idaho, the School of Business Administration for two years and came to Washington, D. C., and graduated from the Benjamin Franklin [2406] University, Washington, D. C.

Q What year, sir?

A 1929.

Q And subsequent to your graduation in 1929, will you describe your experience and the jobs you have held, particularly those that have to do with accounting?

A I began my employment with the Federal Trade Commission in 1929 and have been on a number of

engagements with t h e m, particularly in accounting and economic investigations for a number of years, and for several years I have been employed primarily in reviewing cost justifications submitted by respondent in Robinson-Patman cases.

Q Will you state the foremost cases in which you testified on behalf of the Commission?

A I testified in the Niehoff case, Docket 5768, and in the Thompson Products case, Docket 5872, and also in the Champion Sparkplug case.

Q Mr. Steele, I show you Commission's Exhibit for identification, 5479A-O and ask you if you prepared this document?

A Yes, sir, I did.

Q I direct your attention to the third page of that document which would be Commission's Exhibit for Identification 5479-C.

MR. LUKINGBEAL:

May we go off the record for a [2407] moment?

HEARING EXAMINER LIPSCOMB:

Off the record.

(Discussion off the record.)

HEARING EXAMINER LIPSCOMB:

On the record.

By Mr. Hays:

Q Now I take it 5379-C —

A 54 —

Q 5479-C is the end result of your computations, is that correct, sir?

A That is correct.

Q I take it from the heading on this document C that your figures relate to the Chester and Lewisburg plants for the year 1957, is that correct?

A That is correct.

* * * *

[2414] MR. HAYS:

You may cross-examine.

Perhaps I better offer it first.

I do want to highlight in this offer, Your Honor, that we are not offering this document in an attempt to show a correct cost justification defense. What we are offering this document for is to show in those areas where Mr. Steele employed the same principles that respondent employed in RX 76 to show the distortion that the broad averaging that respondent employed in its RX 76, to show that distortion, and we show it by taking not an over-all plant average, but a two-plant average.

Now, I want it to be as abundantly clear as it can be that we do not contend that a two-plant average is the correct principle to apply to the facts in this case. A two-plant average or even a one-plant average would still constitute broad averages, but we do put it in to show the distortion that the over-all averaging creates.

Now, there are certain areas where Mr. Steele has testified that he used different principles. We contend that those principles are better than the principles em-

ployed by respondent, but we do not attempt to show nor [2415] do we feel that it is our burden to show what the correct cost justification defense is. Our contention is that the burden of sustaining a cost justification defense never shifts to the commission but remains with the respondent.

A further word with reference to Mr. Steele's use of the gross margins. We do not contend that the gross margin method is the correct method to be applied when it is applied in this broad averaging setting, and by broad averaging I mean the two-plant setting. We still claim it is too broad, Your Honor, but as you will see in this computation, where respondent had an offer justification on the basis of its large over-all averaging, you have a cost failure here on a two-plant average of 40 cents. We offer it, Your Honor.

* * * *

[2420]

CROSS-EXAMINATION

By Mr. Lukingbeal:

Q Mr. Steele, would you outline for us briefly the chronological history of your work in connection with this question of whether the Borden Company is or not cost justified in respect of the price differential at issue in this case?

HEARING EXAMINER LIPSCOMB:

Would you read that question, please?

(Question read.)

MR. HAYS:

Your Honor, he hasn't testified that he has done any work with reference as to the ultimate question as to whether it is or is not cost justified. So the question is objectionable on that basis. I wish to call your attention to the fact that when the respondent put Mr. Taggart on the stand, I objected most vigorously that Dr. Taggart was not qualified to state the legal conclusions with reference to cost justification defense.

I am going to be bound by my same rule that whether or not there is cost justification in this defense is a legal conclusion. A legal conclusion may require and certainly does require substantial familiarity with the principles of c o s t accounting, particularly as those principles are to be applied and interpreted in view of [2421] the words of the statute, but in the last analysis, this is a legal conclusion. So to the extent that Mr. Lukingbeal's question calls for legal conclusion, I invite your attention to the fact that Mr. Steele is not on the stand and on direct examination did not testify as to any legal conclusions.

* * * *

[2422] Q Since the issuance of the complaint, you have, of course, devoted a great deal of time to the consideration [2423] and analysis of the various data that you deal with in your report, Commission Exhibit 5479, is that correct?

A Yes, sir.

Q Could you tell us just generally about when you were spending that time and about what amounts of time, sir?

A Well, with respect to the cost aspect of it, Mr. Lukingbeal, which I understand you are referring to, it first came to my attention when Commission Exhibit 76 was introduced in the record through Mr. Darcey.

Q Could I interrupt a moment, Mr. Steele?

A Yes, sir.

Q Do you not mean Respondent's exhibit?

A I am sorry, sir, Respondent's Exhibit 76.

Q Do you not mean 73, that being Mr. Darcey's exhibit as offered in December 1959?

A That is correct, sir, there was a prior offer, and then a subsequent re-offer; yes, sir.

Q But your testimony is that it was around the time that respondent's exhibit 73 was offered, early in December 1959, that you commenced active work in connection with these cost matters, is that right?

A That is correct.

Q What did you do at that time and during the succeeding two or three months?

A Arrangements were made by Mr. Hays for me to go to [2424] the New York office of Borden Company and examine the working papers and other underlying records that Mr. Darcey and others had prepared. I went up there, I am just recalling from memory, sir, but I think it was in February 1960, and I think I was there about five weeks, together with another accountant.

Q And that was full-time work for those five weeks, is that right, sir?

A The other man was there all the time. I think I had to return to Washington for a few days on another case, but I was there substantially all of the time.

Then, we returned to Washington and we summarized the work of the records that had been obtained at the New York office of the Borden Company, and I don't know just how long a time, but it would be several weeks, approximately the same amount of time that we spent in New York.

* * * *

[2426] Q Mr. Steele, does this report of yours, Commission's Exhibit 5479, represent your best professional judgment as to the proper methods of analyzing from an accounting standpoint the costs incurred by the Borden Company in respect of its Borden brand evaporated milk as compared with costs incurred by the Borden Company in respect of its [2427] private label evaporated milk?

A It does, sir, in view of the circumstances and the information available to me.

Q Now, Mr. Steele, you mentioned two qualifications. You said in view of the circumstances. What have you in mind there, sir?

A Well, as you well know, Mr. Lukingbeal, the burden of proof in a cost justification case is upon the respondent and we always have that in mind.

Q Mr. Steele, I am a little puzzled by that response. I had understood you to say that you functioned here as an expert professional man desiring to reach objective judgments as to these matters and I am frankly puzzled as to what burden of proof has to do with that. Have you any response to that, sir?

A Sometimes, Mr. Lukingbeal, if we had sufficient funds, sufficient manpower, sufficient cooperation

from the respondent or sufficient need, we might do a more detailed cost study than was done in this particular case. But lacking that funds and manpower, we only go so far sometimes in order to show that the respondent's method has been negatived.

Q Mr. Steele, are you prepared to say that this report of yours represents a sound, objective, professional analysis of the costs that are involved here?

[2428] A Yes, sir, within the limitations I have stated, sir.

Q Now you mentioned a number of problems there. You spoke of sufficient cooperation from the respondent. Are you prepared to name any single instance when you did not obtain 100 percent cooperation from the respondent in this case?

A No, sir.

Q So that consideration does not apply in this case, is that right, sir?

A That is right.

Q So far as funds and time are concerned, am I correct in my assumption that you are saying that the amount of time which you and your colleague have devoted to this matter was not sufficient to do a better job than you have done in this report; is that right, sir?

A I wouldn't put it that way, sir. We went as far as I thought was necessary.

Q In view of your views as to the burden of proof, is that right?

A That is right.

Q Your views on a legal question?

A Well, I am advised by counsel for the complaint.

Q So Mr. Hays told you this goes far enough, is that right?

A Yes, sir.

[2429] Q You and Mr. Hays together considered that this analysis meets the purposes of the prosecution of this case, is that right, sir?

A Within certain respects, yes, sir. All legal questions I refer to him; all accounting questions, he generally leaves —

Q Yes, sir, what I am trying to get is how much accounting judgment is in this.

Mr. Hays in his argument before he offered your analysis in evidence, said that he does not contend that this two plant averaging that you did here is a correct averaging. Is that your view?

MR. HAYS:

Are you asking him as an accountant now or as a lawyer? I was speaking as a lawyer, Mr. Lukingbeal, when I offered the document. Now t h i s witness is speaking as an accountant. Are you asking him for an accounting conclusion, the accounting principles employed, or are you asking me about my position as to what I think legally constitutes a cost justification?

MR. LUKINGBEAL:

Your Honor, I would respectfully request that the witness be directed to answer this question in the light of the role that he played in this case as developed in the testimony just now.

HEARING EXAMINER LIPSCOMB:

I think the question is clear and I request Mr. Steele to answer it to the best [2430] of his ability.

THE WITNESS:

Mr. Lukingbeal, when the question came up of cost justification, necessarily it covered the area and I had to consult with Mr. Hays and he informed me that he wanted to limit it to the shipments and to the costs applicable to the shipments from these plants. Does that answer your question, sir?

By Mr. Lukingbeal:

Q That answers only the question as to who made the decision to direct this study to these two plants. The question I am now trying to get, Mr. Steele, is whether in your professional judgment the computation that you have made directed at Mr. Hays' instructions to the two plants, represents a sound analysis and reaches sound conclusions with respect to these cost factors?

A Yes, sir, it does, in view and circumstances.

* * * *

[2456] Q Now, Mr. Steele, you were up at Borden, you said, five weeks, I believe, approximately?

A Yes, sir.

Q And during the time that you were up there you had a number of conferences with Mr. Darcey?

A Practically every day.

Q And those conferences were directed to Mr. Darcey's computations, is that right?

A Yes, sir.

Q You were asking Mr. Darcey what were the data that underlay this, and what were the data that underlay that, is that right, sir?

A That is correct.

Q He was furnishing you with that information, is that not right?

A That is correct.

* * * *

[2521] Q Mr. Steele, allow me to pose you a hypothetical question solely for purposes of this question.

Suppose that the Borden Company between November 1 and November 19, 1957, shipped out of Chester and Lewisburg 1,000 cases of Borden brand evaporated milk at the then prevailing price of \$6.45 per case.

Suppose further that during the period November 20 through November 30, 1957, when the prevailing price was \$6.60 Borden shipped no cases of Borden brand evaporated milk out of Chester and Lewisburg.

Will you please tell me the average price per case in respect of the 1,000 cases shipped during the entire month of November that was received by Borden and paid by the customers?

A \$6.45 a case.

Q You would agree with me, would you not, Mr. Steele, that the price at which Borden offers Borden brand evaporated milk at any given time is of no significance for purposes of [2522] determining the average price unless Borden, in fact, sells some at that price, is that not right?

A In your hypothetical assumption, that is right.

Q And you would also agree with me, would you not, Mr. Steele, that the amount of significance to be attached to differing prices offered by Borden necessarily turns on how much Borden sells at each of the prices; is that not right?

A Ordinarily, b u t not for Robinson-Patman purposes, no, sir.

Q Would you like to explain that answer, sir?

A I have just given my explanation. We have to set up an equivalent quantity. You have to have identical quantities so we can have a comparison of prices and determine the price difference on identical quantities so there will be no distortion because of differing quantities.

We had four million cases of Borden brand, we have one million cases of private label brand. There is a distortion in t h e r e because of quantities. Your man can work it out easily.

Q Now, Mr. Steele, are you now speaking as an accountant or are you expressing a legal view that has been stated to you by counsel?

A I am expressing the way we have handled our cases around here and if you wish to, we have precedent in the [2523] Sylvania case. You have Dr. Taggart here who has advised you, who was one of the witnesses in that case and approved this identical principle.

* * * *

[2665] Q First, Mr. Steele, I show you Commission's Exhibit 1247 which relates to a shipment of private label evaporated milk from Chester on November 27, 1957, and shipped to Colonial Stores, Norfolk, Virginia.

I am correct, am I not, sir, in my understanding that that shipment constitutes part of the aggregate number of private label cases that are encompassed in your cost analysis (handing document to the witness)?

A Yes, sir.

Q And that invoice shows, does it not, for the tall 48s the price of 4.9361 per case?

A Yes, sir.

Q And the testimony in this record shows, does it not, that that FOB plant price charged by Borden for private label evaporated milk produced at Chester was determined in [2666] accordance with the cost plus pricing formula which you have mentioned on page 2 of your report?

A Yes, sir.

Q Mr. Steele, I show you Commission's Exhibit 1450 which relates to a shipment of private label evaporated milk packed by Borden on November 1, 1957, from the Dixon, Illinois plant to another address in Illinois. This one shows a price of 5.2164 dollars (handing document to the witness).

I ask, Mr. Steele, if it is not your understanding from the testimony in this case and the work that you have done on it that that FOB plant price was also a cost plus price determined in accordance with the formula to which you refer on page 2 of your report?

A Yes, sir.

Q And the difference between those two FOB prices is as I have just computed it, 0.2803 dollars. Does that sound about right, sir?

A That is right.

Q Now, Mr. Steele, I show you Commission's Exhibit 2861 which relates to a shipment of Borden brand evaporated milk from Chester to Colonial Stores, Nor-

folk, Virginia, on November 18, 1957; attached to this is Commission's Exhibit 2862 which is the freight bill relating to that shipment. I assume, Mr. Steele, that this is one of the invoices in respect of which you computed freight for purposes [2667] of those tabulations that you put in evidence earlier in the case and I ask you, please, to c o n f i r m my computation that the freight cost per case of 48 talls in respect of that shipment was 21 cents (handing document to the witness)?

A Yes, sir.

Q I now show you, Mr. Steele, Commission's Exhibit 5002 which is another shipment of Borden brand evaporated milk made to this same customer, Colonial Stores, Norfolk, Virginia, on the same date as the one we just referred to being November 18, 1957, except that this time the milk came from Dixon, Illinois. Attached to this is Commission's Exhibit 5003 which is the freight bill on that shipment, and I ask you to confirm my computation which shows that the freight per case of 48 talls on that shipment was 53 cents. (Handing document to the witness.)

A Yes, sir.

Q Now, Mr. Steele, on the one that I just showed you, the number of cases in the shipment was 800 whereas the number of cases in the shipment from Chester to Norfolk was 1200. In order not to have any confusion as to whether there was any freight difference attributable to that different sized shipment I also show you Commission's Exhibit 5006 which is a later shipment, December 28, 1957, from Dixon to Colonial Stores in Norfolk of Borden brand evaporated milk, in this [2668] case the number of cases involved was 1200. Attached to this is the Commission's Exhibit 5007,

which is the freight bill, and I ask you to confirm my computation that the freight per case of 48 talls on this one was 47 cents?

A That is correct.

Q Now, Mr. Steele, it will simplify my questioning if you would be willing to agree with me that we speak from now on of a freight of 47 cents per case from Dixon to Norfolk and of 21 cents per case from Chester to Norfolk, but that we speak of the two shipments that were both made on November 18; is that agreeable?

A You want to apply the freight rate on the 1200 case car to the shipment on the earlier date?

Q I suggest it only as a convenience, it is all right here.

A For our purposes here it is all right with me.

Q So that the amount of freight cost incurred by Borden in putting Borden brand evaporated milk into Norfolk, Virginia, and to this customer Colonial Stores, from Dixon, Illinois was 26 cents per case greater than the freight costs incurred by Borden in putting Borden brand evaporated milk to that same place and that same customer from Chester? That is correct, is it not?

A That is correct. That is without knowing the reason why they incurred the additional cost. It is a little bit [2669] puzzling why they would ship from Dixon if they have supplies available in Chester. Maybe they didn't have supplies available, I don't know.

Q Did the question why Borden as a business matter incurred the extra cost enter into your accounting judgment as to what the costs, in fact, were?

A I inquired about that, and I was informed by Mr. Darcey or Mr. Johnston, who presumably obtained

the information from employees of Borden, that there is a section or division of Borden which makes these allocations and determines from which plant it is preferable for Borden's purposes to make the shipment.

Q Mr. Steele, were you not present at the hearings when Mr. Berry of the Borden Company testified at some length about the different planning, production and distribution problems that the Borden Company has with reference to this Borden brand evaporated milk?

A Yes, sir. But I made further inquiry, if you don't mind.

Q Well now, let's talk a little about what Mr. Berry said, that is right in the record and we don't need to talk about what somebody else may have told you otherwise.

A All right, sir.

Q You heard Mr. Berry speak of the necessity for very carefully planning with respect to the stock rotation, did [2670] you not, sir?

A That is correct.

Q The milk is a perishable item and they have got to be very careful to ship out the oldest milk first; is that right?

A Yes, sir.

Q Even though that may involve more freight cost, correct?

A Well, t h e r e is a certain amount of leeway in there, but it is not strictly that, as I understand it, but they attempt to do that.

Q A major business consideration with them?

A Yes, sir, it is a very vital consideration.

Q I don't propose to sit here and go through all of

those. Mr. Berry discussed that subject in great detail and as I recall it had at least eight or nine different considerations that caused Borden as a matter of the ordinary conduct of its Borden brand business to ship Borden b r a n d evaporated milk from different plants to different locations at different times.

Have you taken those factors into account, sir?

A Yes, sir, I considered them.

Q And I suppose we can agree, Mr. Steele, that the difference in the FOB plant price for the private label between Dixon and Chester in November 1957 was approximately 28 cents per case; is that right, sir?

[2671] A Yes, sir.

Q Now, Mr. Steele, we can quickly agree, can we not, that Mr. Darcey in his cost analysis took into account the freight costs incurred by Borden in respect of the Borden brand evaporated m i l k regardless of whether it came from Chester or from Dixon; is that right, sir?

A That is right.

Q And can we also agree that Mr. Darcey in his analysis took into account the fact that there was a difference in this FOB cost plus private label price at different plants and the way he took it into account was in his determination of the average price per case on the private label; is that not right, sir?

A That is right, but he also took into account the quantity differential.

Q You in your analysis have totally excluded from any consideration both the difference in freight costs incurred and the difference in the FOB plant prices prevailing at these different plants; is that not right, sir?

A I have only taken into consideration the difference between the Borden label price and the private label price originating at the Chester and Lewisburg plants.

Q And on this Norfolk, Virginia, situation which I have just posed here, the result of your exclusion of any factor that happens to originate any place else is to exclude [2672] from consideration an aggregate of 54 cents per case of price and cost considerations, is that not right, sir?

A On that particular shipment it is.

Q Fifty-four cents, and I hope you will excuse me for asking, but it works against Borden, is that right, sir?

A Yes, sir.

* * * *

[2683] Q In the last paragraph of your discussion of reserve storage, you say that the quantity of the Borden brand produced at the Chester and Lewisburg plants put through the reserve warehouses and the applicable expense could not be ascertained without examining voluminous detail.

Well, now, here again did you ask Mr. Darcey about that, sir?

A It is my recollection that I did. My notes show that — I have this same comment in my notes.

Q Your notes show that this was a subject that you were thinking about when you were up at Borden, is that right?

A My notes show that this was a subject I explored while I was in New York; the notes were made at the

me I was in New York and conferring with Mr. Darcy almost daily.

* * * *

689] Q You were concerned, were you not, at that time about what the facts were as to whether each of these plants had its own sales force connected with it, weren't you?

A Yes, sir.

Q And the reason you were concerned about that was that it is a fact which has bearing on what is the proper way to go about this cost analysis; is that not right?

A Yes, sir, and the allocation of the selling expense.

Q I suppose the functions of the personnel attached to these different plants also have a bearing on the appropriate type of cost analysis?

A Yes, sir.

Q If you have a situation where plant managers spread around over the country have the responsibility for relationships with customers and the responsibility to decide the prices at which the products shall be sold, that is quite a [2690] different situation from the one we have here, is it not?

A That's the way I understand it; it is not that way here.

Q Here these plant managers really did nothing but produce the amounts of evaporated milk that New York told them to produce; isn't that a fair summary of it?

A Yes, sir.

* * * *

[2806] Q Now of course I assume, Mr. Steele, that reference to your summary table, any figure on there which was arrived at by including one of the figures that has been revised in Respondent's Exhibits 109 through 113, would have to be correspondingly revised. Is that right?

A Yes, sir.

Q You haven't prepared any revised summary table?

A Yes, sir.

Q Do you have it, sir?

A Yes, sir.

[2807] Q Could I see it?

A (Handing document to Counsel.)

MR. LUKINGBEAL:

May I have this marked for identification, your Honor.

HEARING EXAMINER LIPSCOMB:

It may be marked Respondent's Exhibit 114 for identification.

(The document referred to was marked Respondent's Exhibit 114 for identification.)

By Mr. Lukingbeal:

Q Mr. Steele, do I correctly understand that Respondent's Exhibit 114 for identification that you have just handed me accurately reflects all of the various modifications in the summary table as contained in Commission Exhibit 5479, which we had under discussion?

A Yes, sir.

Q And the cost failure figure that you now have on Respondent's Exhibit 114 for identification is \$.2673 per case. Is that right?

A That is correct.

MR. LUKINGBEAL:

I offer this in evidence.

HEARING EXAMINER LIPSCOMB:

Respondent's Exhibit 114 is received in evidence.

(The document heretofore marked Respondent's Exhibit 114 for identification was received in evidence.)

【2808】 By Mr. Lukingbeal:

Q And that is the cost failure figure, that you have without making any modification in your original figure with respect to the average price on the Borden brand. Is that right, sir?

A That is correct.

Q I show you again Respondent's Exhibit 96 for identification, which we were discussing at the last hearing. On page 2 of that document there are a series of five items beginning with investment, and including premium label redemption, advertising, sales department, and broker's commission, in respect of each of which you have given Borden somewhat less credit than it got under Mr. Darcey's computation. Is that correct, sir?

A You mean compared with the revised summary I have, or the original?

Q I don't believe, Mr. Steele, your revisions affected any of these items. Am I right on that?

A Oh, yes, that is right.

Q Am I right, Mr. Steele, in my understanding that in respect of each of these five items that I have just mentioned, your difference with Mr. Darcey does not arise out of the fact that you were doing a two-plant computation and he did a national average one, but arises rather out of the differences between you as to what is a proper amount of [2809] charge on the national average basis?

A Let's see. Those are investment, premium label redemption, advertising, sales department and broker's commission.

Q That is right.

A That is correct.

Q Can we quickly agree, Mr. Steele, that the aggregate of the amount per case about which you disagree with Mr. Darcey in respect of those five items looked at together, is \$.0941. That is to say, the sum of the figures shown in the right-hand column on Respondent's Exhibit 96 for identification?

A That is right, sir.

Q Now can we also agree, so far as the mathematics are concerned, that if you deduct that figure of \$.0941, from the amount of the excess of cost difference over price difference, which Mr. Darcey obtained, and as shown on page 3 of Respondent's Exhibit 96, you get a remaining amount there of \$.0841 per case?

A As far as the arithmetic goes; yes, sir.

Q Now, Mr. Steele, I ask you to assume solely for

purposes of this question, that the method of analysis employed by Mr. Darcey in Respondent's Exhibit 96, is a proper one. On that assumption, solely for purposes of this question, am I correct in my understanding that you agree that the excess [2810] of the cost differences over the price differences is \$.0841?

MR. HAYS:

I object, your Honor. It assumes facts not in evidence. How can that be proper cross-examination? Assume, if you assume that Mr. Darcey's method is correct, they have cost justified. Now Mr. Steele is not, has not introduced anything into evidence, as a cost justification. He has introduced a tabulation, which relates to showing of certain distortions. That is all that has been introduced.

HEARING EXAMINER LIPSCOMB:

Would you read the question?

(Question read.)

MR. LUKINGBEAL:

The record shows that Mr. Steele devoted a great deal of time to checking this very exhibit, although Mr. Hays insists that Mr. Steele has not been called here to testify as to any correct cost analysis, there have, throughout Mr. Steele's testimony, been references to his views about whether Mr. Darcey did something right or didn't do something right.

I put my position on this on a very practical ground, that after Mr. Steele has spent the time he has on this case, certainly we ought to have a record that shows

where he comes out, on this national average basis, because I think he has done the work.

HEARING EXAMINER LIPSCOMB:

We will permit [2811] Mr. Steele to answer the question. Objection overruled.

THE WITNESS:

Well, on the basis of that assumption, yes, sir, but that isn't, of course, my opinion.

* * * *

[2814] Q Well, let's shift to today, Mr. Steele.

Is it today your opinion that the two-plant analysis that you have prepared and testified to, is a proper accounting procedure with respect to the facts in this case?

MR. HAYS:

Now, your Honor, I am forced to object again, because, as I stated earlier in this case, that is, earlier before he introduced this document, Commission's Exhibit 5479, that we were not putting this in as a correct cost justification.

Consequently Mr. Steele has not testified to what is a proper cost justification under the circumstances.

No. 2, and even more important, we are getting into an area as to a legal conclusion, which is exclusively within the province of the hearing examiner initially, and ultimately the Commission. It involves a question of law and as such it is an improper subject for the accounting expert to testify on.

[2815] HEARING EXAMINER LIPSCOMB:

Objection overruled.

You can answer the best you can.

THE WITNESS:

May I have the question read back?

(Question read.)

THE WITNESS:

Yes, sir.

By Mr. Lundvall:

Q What about the national average approach? Is that in your view a proper method in this case?

A No, sir.

Q What about analyzing the costs with respect to each particular transaction that you show in the Commission's prima facie case, would that in your view be a proper accounting procedure in this case?

A Well, it is a question of proper, that gets into a case of whether it can be done or not, practically. All these various expenses, I think freight, yes, freight, but items such as advertising and labels and cartons, several of those other items that, particularly those that had to be allocated on a national basis, from a practical accounting viewpoint it would be almost impossible to allocate it.

Q And it was in the light of those considerations, I take it, you came here with your two-plant analysis, and not with an analysis directed to particular transactions in the Commission's prima facie case. Is that right, sir?

A No, sir.

[2816] Q Do you have any further explanation for that last answer, sir?

A Well, I would not consider it under our circumstances, under ordinary circumstances, working it out on a transaction basis. I did not consider it, let's put it that way.

MR. LUKINGBEAL:

That concludes my cross-examination, your Honor

MR. HAYS:

Your Honor, I have some redirect examination in the light of this most recent cross-examination. May we have a short recess, please?

HEARING EXAMINER LIPSCOMB:

Yes.

Mr. Hayes, how long is it going to take?

MR. HAYS:

Not very long. Just a few questions.

HEARING EXAMINER LIPSCOMB:

All right; we will take a short recess.
(Short recess.)

HEARING EXAMINER LIPSCOMB:

On the record.

REDIRECT EXAMINATION

By Mr. Hays:

Q Mr. Steele, will you refer to respondent's Exhibit 114?

Let me preface my questions by the statement that I am directing my questions to whether or not it would be proper, from an accounting point of view, with or without regard to the availability of accounting records. With that supposition or assumption, would it be proper from an [2817] accounting point of view, with reference to label and carton costs, on Borden brand sales and private label sales, would it be proper to compare those costs as to a specific sale of Borden brand, with a specific sale of private label?

A Well, it could be done, Mr. Hays, yes, it could be done.

Q Is there anything improper about it from an accounting point of view?

A No, sir.

Q Now, sir, with reference to the category "primary freight," without regard as to whether or not the records are or are not available to do so, would it be proper from an accounting point of view, to compare the freight costs on a sale of Borden brand evaporated milk, with the freight costs on a sale of private label evaporated milk?

A Yes, sir.

Q With reference to secondary freight, would it be proper from an accounting point of view to compare secondary freight costs on a sale of private label evaporated milk with the freight costs on a sale of Borden brand evaporated milk?

A That is on the basis that the records are available, or would be available, or could be?

Q No, sir, I am asking you with or without regard to that, would it be proper, as an accounting theory, on accounting principles to do that?

A Yes, sir.

[2818] Q With reference to reserve storage, would it be proper from an accounting point of view to compare the costs of reserve storage on a shipment of Borden brand evaporated milk, with a shipment of private label evaporated milk?

A Yes, sir.

Q With reference to the next category, consignment storage, would it be proper from an accounting point of view to compare consignment storage costs on a sale of Borden brand evaporated milk, with consignment storage costs on a sale of private label evaporated milk?

A Yes, sir.

Q With reference to the category "sales department," would it be proper from an accounting point of view to compare the costs incurred in connection with the sale of Borden brand evaporated milk and the costs incurred in connection with the sale of private label, or a sale of private label evaporated milk?

A No, I don't think, that would be entirely impractical because there are too many allocations. Not even if you had a specific time study, it would be even difficult there, to apply it to a specific sale of each product. Or each brand.

Q Assuming you had a time study, would it be proper from an accounting point of view, to compare the sales cost on a sale of Borden brand evaporated milk

with the sales cost on a [2819] sale of private label evaporated milk?

MR. LUKINGBEAL:

I understood the witness answered that question. He said even if you had a time study, it could not be done.

HEARING EXAMINER LIPSCOMB:

The question may be answered.

THE WITNESS:

No, I don't — in other words, you can't tie it down to a specific sale, even with a time study. There are many other overhead items in there, which would have to be allocated, and it is not chargeable directly to a specific sale, without making some more or less arbitrary allocations.

By Mr. Hays:

Q Could you make those arbitrary allocations on a sale of Borden brand evaporated milk?

A Yes, I have worked it down here on a per case basis and you could use figures like that, which is a broad averaging.

But if I understood you correctly, Mr. Hays, I was applying myself to a specific sale, and chargeable to that sale, directly chargeable to that sale.

Now, sales expense, it would be very difficult to arrive at a charge to a particular sales transaction, without making some allocations based upon — well, without making allocations.

Q Well, with making allocations, could you do it?

[2820] A Yes, sir.

Q It would be perfectly proper from an accounting point of view, to do that?

MR. LUKINGBEAL:

That question is somewhat leading, your Honor.

By Mr. Hays:

Q Would it be perfectly proper, assuming that appropriate allocations were made to compare costs, on a sale of Borden brand evaporated milk compare the costs on a sale of private label evaporated milk and by costs, I mean sales department costs.

A Yes, sir.

Q Now, referring to the category "labels and cartons," respondent's Exhibit 114, I believe it is true on some of the labels and cartons with reference to private label evaluated milk, there were absolutely no costs incurred.

Is that correct?

A Well, if we confine ourselves to Chester-Lelandburg, Mr. Hays, I think the cartons were always furnished out of these two plants, private label. There were no costs incurred for the labeling, for the labels or for the stenciling which went in there on some of them.

But I think the cartons were furnished in every case if I remember correctly.

Q Now, with reference to labels, and stenciling, I think [2821] you have the exact figures, if you refer to your study that you made prior to the introduction of Respondent's Exhibit No. 114.

Now in so far as the label costs are concerned, on some of that private label milk, according to the accounting procedures used in Respondent's Exhibit 114, it was

be impossible from an accounting point of view, to cost justify a different price based solely upon the differences between the sales of private label milk, in which there were labeling costs, and sales of private label milk, in which there were no large costs.

A Oh, yes, that is correct.

[2822] Q Under the accounting principles employed in Respondent's Exhibit 114, with reference to primary freight, isn't it a fact the record reflects that on all of the private label shipments, there was no primary freight, there were no primary freight charges to the Borden Company?

A Well, it happened in certain cases, Mr. Hays, that the Borden Company paid, or pre-paid the freight bill, but did not collect from the customer the full amount of the freight bill for one reason or another, and so it showed a small expense to the Borden Company for the amount that they failed to collect.

Q There are, however, substantial transactions, substantial number of transactions, where there were no freight costs to the Borden Company on sales of private label evaporated milk. Is that correct?

A That is correct. Those cases where the company failed to collect the full amount of the freight bill generally involved a shipment of small 48s.

Q Under the accounting principles used in Respondent's Exhibit 114, it would be impossible, would it not, to give full effect to the full amount of the freight costs between Borden label evaporated milk, in which there were freight costs, and private label evaporated milk, in which there were no freight costs; is that correct?

A I am afraid I don't quite understand the question, **[2823]** Mr. Hays.

Q Let me withdraw that question t h e n, and approach it from a different point of view. Under the accounting principles employed in Respondent's Exhibit 114, the average freight costs on Borden brand evaporated milk is .2803.

Am I correct on that?

A Yes, sir.

Q Now as a matter of fact there were a number of instances in which the freight costs on Borden brand evaporated milk were considerably more than .2803 per case, were they not?

A Yes, sir.

Q But under the accounting principles employed here, that is all that can be claimed, is that correct?

A Yes, sir.

Q Did you have any difficulty in determining the primary freight on specific sales of B o r d e n brand evaporated milk?

A No, sir.

Q Is there any indication in the record, insofar as our study goes, that any purchaser purchased one or more cases of Borden brand evaporated milk at either the average price computed by you, or the average price computed by Mr. Darcey and Mr. Taggart?

A No, sir.

Q In your study of the record, is there any indication that any customer purchased one or more cases of private [2824] label evaporated milk at the average private label per case, either that computed by you or that computed by Mr. Darcey and Dr. Taggart?

A No, sir.

Q According to the accounting principles employed in Respondent's Exhibit 114, there is a figure which

referred to as a cost failure, which is \$.2673. Under the accounting principles reflected in the advertising, on this exhibit, would it be possible to increase the advertising costs in California, to a point where this alleged cost failure would be wiped out by virtue of the increased television costs in California?

A Let me see if I understand you, Mr. Hays. In the first place, this figure here is a national average.

Q Not on Respondent's Exhibit 114, is it?

A Yes, sir, advertising is; yes, sir.

Q That is a national average?

A Yes, sir.

Q Would it be possible to increase the costs in California, let me put it this way, Mr. Steele: Wouldn't it be possible to pay a television station in California for advertising in California and increase the costs by more advertising, to a point where this \$.2673 figure was absolutely eliminated?

MR. LUKINGBEAL:

Your Honor, I assume that question is addressed solely to the possibility, as a matter of [2825] mathematics, and not to any business question.

MR. HAYS:

Yes, it is. It is addressed solely to the accounting principles employed here.

THE WITNESS:

Well, if we assume the advertising was related solely to California and we set this up on the basis of the advertising in California, it would be possible, yes, sir.

By Mr. Hays:

Q Well, the advertising which is reflected here does reflect some California advertising, doesn't it?

A Yes, sir.

Q Now I am speaking of increasing the costs of that California advertising, mathematically and statistically and from an accounting point of view, to where this alleged cost failure of .2673 was eliminated. That could be done, couldn't it?

A It is possible, but not probable.

Q It is possible from an accounting point of view?

A Yes, sir.

Q In other words, if the costs increased in California substantially and you applied the same accounting principles applied in Respondent's Exhibit 114, you might ultimately reach a point where there was no cost failure?

A If I, instead of applying these costs to the shipments out of Chester and Lewisburg plant, I applied the costs say [2826] to the shipments out of a California plant, that would be true.

Q But this is a national average, isn't it?

A Yes.

Q So suppose you applied the same principle here to Chester and Lewisburg, with those increased costs?

A That wouldn't be probable then. There is \$7 million of advertising in here, which is allocated on a percentage of sales basis, among the various Borden brand products, and so we get a very — this figure on a national basis of Borden brand advertising per case. Now any advertising in California would only increase that national average. I don't think it would be possible from that viewpoint.

Q I mean from an accounting point of view, not from a practical point of view, but an accounting point of view. I grant you that it would have to be a substantial amount expended in advertising. But from an accounting point of view, wouldn't that be possible under this accounting principle here?

A No, not —

MR. LUKINGBEAL:

Could I have the last question read back — and I do it only because I want to be sure the reporter has accurately what Mr. Hays stated.

(Question read.)

THE WITNESS:

Well, this is worked out on a [2827] national average basis, Mr. Hays, and it would take a considerable expenditure of advertising in California to make any substantial difference, change, here, on a per case basis.

MR. HAYS:

That is all.

HEARING EXAMINER LIPSCOMB:

Do you have any recross?

MR. LUKINGBEAL:

I may have just a question or two.

RECROSS EXAMINATION

By Mr. Lukingbeal:

Q Mr. Steele, Mr. Hays asked you in one of his last

questions there to distinguish between a practical point of view, on the one hand, and an accounting point of view on the other.

Now you, as an accountant on the Commission staff, don't make any such distinction, do you, sir?

A No, sir.

【2828】 Q In other words, you want to be practical about things?

A We take into consideration the practicality of the problem.

Q Isn't it fair to say, Mr. Steele, that that is the reason you didn't come in here with an effort to analyze these costs, with reference to particular transactions. You came in with this two-plant approach, is that not right?

A Well, no, sir, because as I said previously, I just didn't consider the transaction basis.

Q You came in here with one that you at least regarded as being practical, is that right?

A Yes, sir.

Q And you didn't even consider this transaction by transaction, that Mr. Hays has been questioning you about, is that right?

A No, sir. That is right, yes, sir.

Q Now, talking about practicality, and I am referring now to your answers to Mr. Hays with reference to primary freight, secondary freight, reserve storage, and consignment storage, on the Borden brand side, it is the fact, is it not, Mr. Steele, that it was the business policy of Borden to be in a position to deliver Borden brand evaporated milk to any purchaser, anywhere in the country, in the shortest possible time?

Is that not right?

[2829] A Yes, sir, that is what I understand from the testimony.

Q And is it not the fact that Borden, in order to carry out that policy, and, therefore, to be in a position to sell the Borden brand evaporated milk for the prices it got, maintained this system of 15 or so reserve storage warehouses which were located on the way to the markets, and this system of 100 or so consignment storage warehouses?

Is that not right?

A Well, I know that they did that.

Now, the reason why they did it, Mr. Berry's testimony, yes, I guess that — he gave that as a reason to make it available to the customer.

Q Isn't it also the fact, Mr. Steele, that sometimes Borden filled orders by shipping direct from the plant to the customer, sometimes they filled orders by shipping out of another reserve warehouse and sometimes they filled orders by shipping out of consignment warehouses, isn't that right?

A Well, the usual pattern, as I understand it, Mr. Lukingbeal, is that carload shipments were filled out of the plant and out of the reserve warehouses. LCL shipments were filled out of consignment warehouses.

Q And when Borden shipped a particular order out of a plant, incurring a particular freight charge in respect of that order, it might happen that the next order for that customer might be filled out of a reserve warehouse, isn't **[2830]** that right?

A Yes, sir.

Q Borden, in order to be in a position to fill each customer's order when it came in, wherever the cus-

tomer was, had to maintain this entire pipeline system, did it not?

A That was Mr. Berry's testimony.

Q So you don't really mean to say, Mr. Steele, as a practical accounting matter, from the Borden business standpoint, you can separate out the freight costs incurred by Borden in respect of some particular shipment and say that you will look at that, without regard to any of the other freight costs that Borden incurred in maintaining this whole system of distribution?

A Well, you are referring back to Mr. Hays' question there. And he was talking about a particular shipment.

Now, it can be worked out, that is what I said.

Q Yes. You mean so say as a matter of fact mathematically it can be worked out, right?

A Yes, sir.

Q You do not mean to say as a matter of fact of the type of practical accounting that is applied by the Commission's accounting staff, it would be proper to work it out that way, do you?

A Well, we haven't done it that way.

Q That is right and you didn't suggest it be done that way [2831] in this case, did you, sir?

A No, sir.

Q You don't now suggest it ought to be done that way as a practical accounting matter, do you?

A No, sir.

Q Mr. Hays asked you a similar question about these labels and cartons. The same sort of analysis applies there, doesn't it?

A Yes, sir.

Q You don't suggest those ought to be done in a dif-

ferent way than on a basis that takes into account the whole course and trend of the business, is that right?

A Well, unless we were concerned about particular customers, it could be worked down, in fact, it was built up on a customer basis, actually.

Q Mr. Steele, is it fair to say, in summary of this, that Mr. Darcey computed these costs by taking into account all of the data, on both the price and the cost side, and that the most that you are suggesting by way of possible alternative procedure, is that it might be practical to analyze them on the two-plant basis that you computed. Is that right?

A Yes, sir. If you take into consideration the way I computed the price differences, yes, sir.

MR. LUKINGBEAL:

That concludes my recross.

[2832] FURTHER REDIRECT EXAMINATION

By Mr. Hays:

Q Mr. Steele, with reference to primary freight, did you ever give any consideration to comparing the freight charges on a single sale of Borden brand evaporated milk, with the freight charges on a single sale of private label evaporated milk?

A Yes, sir.

Q Is there anything improper with comparing, from an accounting point of view, or practical point of view, of comparing actual freight costs on a sale of Borden label evaporated milk and a sale of private label milk?

A No, sir.

* * * *

[2838] Whereupon,

EDWARD M. DARCEY

was recalled as a witness for the Respondent and, having been previously sworn, testified as follows:

* * * *

DIRECT EXAMINATION

By Mr. Lukingbeal:

* * * *

Q Mr. Darcey in Commission's Exhibit 5479 the average price for the private label evaporated milk for the year 1957 and for the Chester and Lewisburg plants, is a lower amount by I think roughly 25 cents a case, than is the average private label price for the year 1957 as you reported it in your Respondent's Exhibit 76, where you were directing yourself to all of the private label business, all over the country.

[2846] Is that correct, sir?

A Yes, sir.

Q Now Mr. Darcey, will you tell us if you know whether the average price for the private label in the year 1957, at the Chester and Lewisburg plants, was lower than the average price for 1957, out of any of the other plants?

A Yes, sir, the Chester and Lewisburg price was lower than the average price of any of the other plants, packing private label evaporated milk, during 1957.

* * * *

[2849] Whereupon,

HERBERT F. TAGGART

was recalled as a witness for the Respondent, and having been previously sworn, testified further as follows:

* * * *

DIRECT EXAMINATION

By Mr. Lukingbeal:

* * * *

[2850] Q Doctor, does Mr. Steele's computation, Commission's Exhibit 5479, and the various amendments of it, have any bearing at all on your thinking with respect to the propriety and soundness of the accounting procedures used in Respondent's Exhibit 76?

[2851] A Yes.

Q What?

A Well, they reinforced the conclusion I previously arrived at, that Respondent's Exhibit 76 is the proper way to go at this.

Q Had you, prior to the time that Mr. Darcey submitted Respondent's Exhibit 76 in this proceeding, given any consideration to other possible accounting procedures that might be employed in this matter?

A I am sure that various accounting procedures, various ways of going at this, were discussed in the early stages and I have forgotten what those were specifically, but I am sure that the complete respondent's Exhibit 76 approach was not born full blown without the consideration of other possible ways of going at either details or more fundamental matters.

Q By "more fundamental matters," I take it you have in mind the kinds of general problems that were discussed during Mr. Steele's testimony, that is, transaction by transaction approach, two-plant approach and so on, is that right?

A Oh, yes, of course.

[2852] Q Now have you formed any view, Doctor, as to whether the two-plant approach employed by Mr. Steele is or is not, from an accounting standpoint, a proper procedure with respect to the facts t h a t we have in this case?

A Well, my basic objection of course to the two-plant approach is that I think it gives a totally distorted picture of the situation as it exists. That is, I should never adopt the two-plant approach in the first place. I think that is my primary reaction to this approach.

Q Well now, Doctor, in Mr. Steele's testimony there was some discussion of accounting possibilities, as distinguished from practicality.

Do you have a view, Doctor, as to whether the accountant should bear in mind not only the technical possibilities of computing a particular figure, but also the meaningfulness of the figure that is obtained?

A Well, there is no question about that. A figure which has no true economic significance, that is a figure which gives the management of a company, for example, no guidance as to conduct, no proper information as to policies to be followed for example in setting sales prices or determining manufacturing procedures and so on, is not a true accounting figure.

An accounting figure has to have in it much more than merely dollars and cents. It has to have in it an

[2853] economic significance, a significance to management in order to be a true accounting figure.

Q In other words, it might be mathematically accurate, but meaningless, is that correct, sir?

A That is right. It might be the result of a very precise division of one number by another, and have no meaning whatever.

Q Well now, Doctor, during Mr. Steele's testimony we were talking about a situation where Borden brand evaporated milk had been shipped from Borden's Chester plant to Colonial Stores in Norfolk, Virginia, at a readily ascertainable freight cost, in respect of that shipment. And on the same day Borden had shipped Borden brand evaporated milk to that same customer, in Norfolk, Virginia, from the Dixon, Illinois, plant, at a freight cost which was 26 cents a case higher.

We brought out the fact that Mr. Steele, in his two-plant analysis, had included the freight incurred in respect of the shipment made from Chester to the customer in Norfolk, Virginia, but had not included or given any consideration to the freight cost incurred by Borden in shipping from Dixon to that same customer.

Now, Doctor, do you have a view as to whether the freight costs thus determined and taken into account by Mr. Steele are a meaningful accounting determination? ing its business.

[2854] A I don't think it is meaningful at all, as a matter of fact, without taking into consideration both freight costs.

Q And of course under Respondent's Exhibit 76, all of the freight costs that were involved are taken into account, is that not right?

A That is correct.

Q Including all of the costs of shipping Borden brand evaporated milk from plants in different sections of the country, to customers in other sections of the country. Is that right, sir?

A That is exactly right.

Q Do you regard that freight determination, I take it, as a meaningful figure?

A Very definitely, because this is the freight determination with which Borden is confronted in conducting its business.

Q Now, Doctor, from the standpoint of the role of the accountant in ascertaining the costs that are involved in a situation such as this Borden brand freight, do you regard it as necessary or appropriate for the accountant to inquire into or question the business judgment of the businessmen in conducting their business as they in fact do?

A Well, thinking of this in terms of an accountant not [2855] directly employed by the business, that is not a member of the business family, who might of course conceivably question judgment with respect to certain matters, but thinking of him purely in the role of accountant, without managerial responsibility, certainly his role doesn't require the consideration of whether or not an expenditure represents the optimum managerial decision.

Q What he is interested in is whether in fact the expenditure was incurred in the conduct of the business as it was in fact run; is that right?

A Precisely. The accountant is concerned with the facts as they exist.

Q Now, Doctor, you will also recall that during the testimony of Mr. Steele reference was made to

fact that in the Southern Division, the Borden brand dollar sales in the year 1957 constituted 52 percent of the total sales of the Food Products Division in that year, whereas for the country as a whole, the Borden brand field force expenses constituted only 44 percent of the Food Products Division's total sales.

Now, Doctor, will you assume with me, solely for the purposes of this question, that you are directing yourself to Mr. Steele's two-plant approach to this problem. If you are going to do that, have you a view, Doctor, as to whether the 44 percent national average figure or the 52 percent [2856] Southern Division figure, represents the more reliable indication of the field force effort as it may be in any way related to the Chester and Lewisburg plants?

A Of course you understand that I don't agree with the two-plant approach. However, if we are to consider the so-called two-plant approach, we are essentially considering a set of facts all of which took place in a particular geographical area; that is, facts with respect to deliveries of evaporated milk to customers, within this area, and we must necessarily therefore, to the best of our ability, consider the cost facts as they relate to this area.

That is, you can't segment out a portion of the national total, based on geographical considerations, on the sales side, without also to the best of your ability, segmenting out the cost factors, which also play a part in this same geographical area.

Now it is quite obvious to me that if the dollar sales basis for allocating sales department expense is a proper one, the proper basis to use in this particular geographical area, is the one that applies to that area,

which, roughly at least, would be the 52 percent.

Q Yes. In that same connection, Doctor, the fact was brought out that the gross margin in the Southern Division was approximately 45 percent, whereas Mr. Steele in his computation, used the national average gross margin of roughly [2857] 40 percent.

I take it, Doctor, that if you assumed, (1) that you are going to do the two-plant approach, and (2) you are going to use gross margins, rather than dollar sales, as your allocating basis, it would be your view, in light of what you have said, that it would be the 45 percent figure that should be used rather than the 40 percent.

Is that right, sir?

A Here again I should add the fact that the gross margin approach doesn't appear to me to have very much merit, but if one is to assume that it is to be used, then it seems obvious it should be the gross margin that is applicable in the particular area we are dealing with, and not a gross margin based on nationwide sales.

Q Of course, Doctor, you have in mind, I assume as Mr. Steele pointed out from time to time in his testimony, that the sales of Borden brand evaporated milk that were made in the Southern Division, the territory that Borden defines as its Southern Division, were not exclusively products originating at the Chester and Lewisburg plants. You bear that in mind, do you not?

A Well, my understanding is that a very substantial part of the Borden brand milk that was sold in this area came from other plants.

Q And you also are bearing in mind the fact that some of the [2858] milk that originated at Chester and

Lewisburg, was in fact sold entirely outside of the Southern Division, is that right?

A That is what I understand, yes.

Q But you are saying, I take it, if you are going to try to segment the data somehow, the Southern Division cost data, on this sales force item, affords a better basis to work with, than the national average. Is that right?

A Well, it gives — I should certainly say — a fairly clear indication, because these fringe areas into which Chester and Lewisburg milk was shipped are, as I recall, account for a relatively small part of their milk, although I am not sure about this.

Q But at least it is better indication?

A This is certainly a far better indication than a nationwide total, there is no doubt about that.

Q At the same time, Doctor, if I understand it right, you have not suggested that any precise figure should be computed based on the 52 percent in the Southern Division, is that right, sir?

A Well, no. I think this so-called two-plant approach would have to be very carefully considered and refined and perhaps modified, before you could even come anywhere near getting anything like exact figures.

Q Now we were talking a moment ago, Doctor, about the [2859] 26 cents of freight incurred by Borden in shipping Borden brand from Dixon, Illinois, to a customer in Norfolk, Virginia, over and above the freight costs that Borden incurred in shipping to that same customer from Chester.

Now do you have a view as to whether, if you are going to have a two-plant type of analysis, you do or

don't need to bear in mind that there is that extra freight factor somewhere in the picture?

A Well, you obviously have to bear that in mind and that is one of the difficulties I find with the so-called two-plant approach. The two-plant approach implies, as Mr. Steele worked out here, that you are thinking solely of milk produced at those two plants, but as an accounting and economic fact, the fact is that in the areas that we are talking about, milk wasn't all produced at these two plants. A great deal of it was produced at Dixon, Illinois, and various other locations.

Q Now I take it that you regard Respondent's Exhibit 76 as having properly taken into account all of the freight factors, is that right?

A Yes, there is no question about that.

Q Is it fair to say, Doctor, it is your view that is the proper way to take all the factors into account?

A Well, it surely is.

Q Now of course, Doctor, you bear in mind that that [2860] 26 cents of extra freight on the shipment from Dixon down to Norfolk, that was involved in the particular example we mentioned, is not necessarily representative of the dollar amounts involved, on all of the cross shipping situations. Is that right, sir?

A Well, it is merely an illustration of a particular instance, which was repeated in a great many locations with a great many variations, throughout the entire area that we are talking about.

Q Yes. Here again, as I understand it, you have not recommended that any effort be made to ascertain some precise per case amount of freight reflecting these shipments from plants outside, down into the

areas where Chester and Lewisburg were shipping, that is to say, a figure which would then be applied to the two-plant analysis. Is that right?

A No, I made no such recommendation.

Q You regard it as a factor that has to be borne in mind, is that right?

A Well, you can't overlook it.

Q Now, Doctor, I talked with Mr. Steele about five items involved in the analysis where the differences between him and Mr. Darcey, as he saw it, arose not out of the fact that he was using the two-plant approach, and Mr. Darcey was using the national average, but rather out of differences [2861] between them as to what is the proper amount, under either approach; in effect, the items were investment in inventories and accounts receivable, the premium label redemption costs, the advertising, the sales department and the broker's commissions.

Now the sales department, you and I have just discussed here this morning and you have expressed the view that if you were going to have a two-plant analysis, you should, if anything, credit Borden with a greater cost per case, than Mr. Darcey did. Is that right, sir?

A If you were to have a two-plant analysis, is that your question?

Q Yes.

A Yes, for this particular area it is true.

Q Now with respect to the other four items, Doctor, that is to say, investment in accounts receivable and inventories, premium label redemption, advertising, and Broker's commissions, I take it that when, at the outset of your testimony here today, you said that noth-

ing that you had heard had changed the views that you previously expressed, you were saying, among other things, that it continues to be your view that on the national average basis, each of those items should be taken into account, as is done in Respondent's Exhibit 76, is that right, sir?

A I agree completely with Mr. Darcey's handling of these [2862] and I still feel the same way.

Q Now, Doctor, just for purposes of this question, assume that you were going to have a two-plant approach, such as Mr. Steele's. Would you or would you not regard each of these as items to be taken into account and credited to Borden, under a two-plant approach?

A No question about it.

Q And in at least the amounts that are credited to Borden under Respondent's Exhibit 76; is that right, sir?

A I see no reason why the amounts should be materially different.

By Mr. Lukingbeal:

Q Now, Doctor, there was a great deal of discussion during Mr. Steele's cross-examination about his equivalent case method of determining the Borden brand average price under his two-plant computation. You will recall that in using that method, he obtained an average price on the Borden brand side, which was approximately seven cents per case higher than the average price obtained and reported by Mr. Darcey, in Respondent's Exhibit 76.

Now again, Doctor, asking you to assume for purposes of this question, that you are directing yourself

to Mr. Steele's two-plant analysis, have you a view as to whether the Borden brand average price should be determined as Mr. Darcey did it, or as Mr. Steele did it?

[2863] A It should certainly be determined as Mr. Darcey did it.

Q Doctor, there was a good deal of discussion about the Sylvania case, as having used the equivalent case method and about the fact that you had approved the use of that method in the Sylvania case. Now I think we talked there, Doctor, about two different subjects and I would like you to address yourself to them one at a time.

First, we talked about considerations relating to the use of the equivalent case method regardless of which end you start from, and then we also talked about considerations relating to which end you start from, if you are going to use that method.

Would you please, Doctor, give us your views as to the first point, the considerations bearing on use of the equivalent case method as distinguished from the method that Mr. Darcey used?

A Yes, I would be glad to. Of course I was involved in the Sylvania proceedings, I was at that time extremely familiar with Sylvania's operations, their business problems, the things which they had to take into consideration in making these determinations, and I can say without any question in the world that the only reason they undertook this extremely elaborate and time-consuming method, which it was in this case, in the Sylvania case, was because they were dealing on each side with something like 600 tube types, which **[2864]** varied in price all the way from

a few cents, some 20 or 30 cents, up to \$5 or \$6 apiece. This was the factor in their situation which caused them to feel that this elaborate computation was necessary in order to give what they considered a true picture of the price relationship.

Q Well now, Doctor, during cross-examination of Mr. Steele yesterday, I made the statement that it was my understanding that the first step in the Sylvania analysis was to determine the average price per tube for each of the tube types that were sold to Philco. And that that first step had been done in exactly the way Mr. Darcey did it, that is to say, take the total number of dollars received from the sales of that tube type during the year and divide by total number of units of that tube type which were sold. Is that a correct statement?

A This is perfectly true. This appears clearly on their report, and this is exactly what they did; for any individual tube type, sold to Philco, they simply took the number of dollars received from Philco and divided by the number of tubes sold, over the year as a whole, and this was the Philco average price.

Now having obtained that average price for each tube type, Sylvania was then faced with the fact it had 600 average prices, is that right?

A That is certainly correct.

[2865] Q Now, Doctor, at one point in the cross-examination of Mr. Steele yesterday, I thought he was suggesting that in this present Borden brand case the fact that the private label evaporated milk had a somewhat different FOB plant price at Chester than it did at any given time at Lewisburg, and the fact that the

private label evaporated milk price changed each month during the year, created some kind of problem perhaps comparable with those 600 different tube types in Sylvania.

Do you have a view on that subject, sir?

A Well, it certainly wouldn't occur to me that the rather small variations in price, month by month or between Chester and Lewisburg, were of a magnitude which would require the kind of approach that Sylvania took. Their variations were of immensely greater magnitude and they were dealing with products which everyone agreed had quite different appearances, uses, et cetera.

Q They were running a risk of getting differences in product mixes, depending on how many of those 600 units might be looked at in any given instance, is that right?

A Yes, this was their problem essentially. If they had been able to start with the verifiable assumption that the product mixes purchased by the Sylvania distributors, and the Philco, for renewal purposes, were identical, then they too could have ignored this. But of course this actually [2866] presumably wasn't a fact and in any event they couldn't assume it was a fact.

Q They couldn't assume it would be the fact with respect to any particular combination of those 600 tube types, is that right?

A Oh, no. If the discussion had boiled down to the 22 tube types, which as I recall were listed in the — I believe they were listed in the original complaint — quite obviously they couldn't assume that the product mix was identical on the two sides there either.

Q Well now, Doctor, on that series of hypothetical examples that I prepared, Respondent's Exhibits 97 through 101, it appeared on particular figures that I used there, that if you employed the equivalent case method, you will get, on the side you start with, the same average price that you get by using Mr. Darcey's method.

On the other hand, on the side that you do not start with, you will get a different average price than you get by Mr. Darcey's method, and it may be higher or lower than you get under Mr. Darcey's method, depending on the pattern of shipments and prices on the side you start with. Is that right?

A That is very clear, yes.

Q And we also have in evidence here computations that show that on the very facts of this case, at least that segment [2867] of the facts that Mr. Steele endeavored to deal with in his cost analysis, you get that same sort of swing, depending on which side you start with. I am referring now to Respondent's Exhibits 106 and 107, where Mr. Darcey computed the average price on the Borden brand side under the equivalent case method, but starting with the Borden brand side of it.

A Perhaps I should see those exhibits.

Q Respondent's Exhibit 106 which you now have in front of you, Doctor, you will recall is the one where Mr. Darcey did the equivalent case analysis, starting with the Borden brand side, and using the Borden brand data that are encompassed in the Commission's prima facie case with respect to Chester and Lewisburg.

The other one, Respondent's Exhibit 107, you will recall is the one where Mr. Darcey did the equivalent

case computation, still starting with the Borden brand side, but in this instance using the Borden brand sales in the Southern Division. In each instance, as you will recall, Mr. Darcey got a difference in the average price per case as shown there at the bottom of each of those exhibits, which is of the order of 8 and 9 cents per case less than the differences that Mr. Steele got by doing this equivalent case computation starting with the private label side.

A As I recall, Mr. Steele's difference was approximately \$1.55.

[2868] Q The precise figure, Doctor, is \$1.5537?

A Yes, and on Respondent's Exhibit 106A, the differential which Mr. Darcey computed is \$1.4717, and on Respondent's Exhibit 107A, his differential is \$1.4644, approximately, well, nearly a cent less. So that as between these two computations, both of which start on the Borden brand side, and Mr. Steele's computation, which started on the private label side, the difference is either approximately 8 cents or approximately 9 cents.

Q Yes; now, Doctor, I am about to ask you a question which involves a series of assumptions and I hope it will not be too long.

First, I ask you to assume that you direct yourself to a two-plant analysis, rather than to the national average.

Secondly, I ask you to assume that you are going to use the equivalent case method of determining the average price on the Borden brand side.

Third, I ask you to assume that you are going to apply that equivalent case method as nearly as possible in the way it was done in the Sylvania case.

On those assumptions, Doctor, have you a view as to whether Respondent's Exhibits 106 and 107 constitute a fair application of the equivalent case method to the data in this case relating to the Chester and Lewisburg areas?

[2869] A Well, of the two, I should certainly prefer on Respondent's Exhibit 107, because it deals more completely with the facts as they existed, whereas 106A is confined to relatively small number of cases which don't really represent the business as it was actually done.

With regard to 107A, if one can assume that the Southern Division is a rough equivalent of the area into which Chester and Lewisburg milk was shipped, then 107A would represent a very precise, a very accurate application of the so-called equivalent case approach, starting with the Borden brand side.

Q That is to say, if you are going to construct equivalent cases, as was done in Sylvania, for the reasons that you have indicated, and if you are going to construct them in the way that was done in the Sylvania case, you would regard 107A as a fair application of that, subject only to whatever question one might have about the degree to which the Southern Division is in fact related to Chester and Lewisburg.

Is that right, sir?

A I think this is a fair statement, yes.

[2870] Q And of course I suppose, Doctor, that the fact that the Southern Division sales area is not really related to Chester and Lewisburg or any other plant, is one of the considerations, as I believe you have testified, that in your view calls for doing this whole thing on a national average basis, is that right?

A This is perfectly true. The Southern Division, as such, had no particular relationship to Chester and Lewisburg, except a geographical one. Chester and Lewisburg plants had no sales force, they did not do any advertising, did not carry on any of the activities that we have been talking about, with respect to the sales. They did pack and ship the stuff, of course. But they were not responsible for distribution activities. The Southern Division national sales organization, plus of course the supervision from headquarters, was responsible for this, without any relation to whether the milk that was sold there came from Chester and Lewisburg or whether it came from Dixon, or New London or anywhere else.

Q Doctor, during Mr. Steele's cross-examination, reference was made to the fact that Chester had shipped some private label evaporated milk to a customer in Norfolk, Virginia, at a certain f.o.b. plant price, with the customer of course paying the freight, and that the Dixon, Illinois, plant, around that same time was shipping out private label evaporated milk at [2871] a price determined under the same cost-plus pricing formula, but some 28 cents a case higher in that particular instance than the Chester f.o.b. plant price. And it was pointed out that under Respondent's Exhibit 76 the business facts that are involved in that situation are taken into account, because Respondent's Exhibit 76 in determining the average price on the private label side takes all of those different prices into account.

It was further pointed out of course Mr. Steele's two-plant analysis does not do that. It looks only to the f.o.b. plant prices at Chester and Lewisburg.

Have you, Doctor, a view as to the significance any, of those facts as bearing on this whole cost analysis problem we have here?

A Well, I do. This 28 cents, that is the difference the fact that there was a different price on private label milk shipped out of Dixon, it seems to me is an economic fact which must be influential in Border pricing, selling, manufacturing policies and the way to take into account this obviously important piece of economic and accounting data, is to include in your computations all of the operations of not only the plant on plant, but also all the other plants.

Q There again of course the 28 cents, on that particular instance, is not necessarily the amount that is involved in [2872] all the other instances of that kind.

Is that right, sir?

A Well, that is true, but it is indicative of the fact that we are not talking about a minor item. That is, this is apparently of some importance.

MR. LUKINGBEAL:

That concludes my direct examination, your Honor.

MR. HAYS:

I have some cross-examination.

I would like to have a short recess.

HEARING EXAMINER LIPSCOMB:

We will take a short recess, gentlemen.

(Short recess.)

HEARING EXAMINER LIPSCOMB:

On the record.

CROSS EXAMINATION

By Mr. Hays:

Q Doctor, during the course of your employment by the Borden Company, I take it you had access to a lot of their records, cost records, price records?

A Why, I had access to them, if I had any need to look at them, yes.

Q Did you look at any of them?

A Well, frankly, I don't think I did. I have seen copies of invoices, as far as price records are concerned, a limited number. Cost records — of course I have seen transcripts of cost data prepared by Mr. Darcey, or his [2873] assistants, so in that sense, I saw Borden's cost records.

Q Only those records appearing in Respondent's Exhibit 76?

A Oh, no. I saw Borden papers of one kind or another, underlying tabulations of the sort that Mr. Steele reviewed to some degree.

Q Did you ever see any record kept by the Borden Company of its average prices of Borden brand evaporated milk?

A A record of average prices?

Q Yes.

A That is not the type of a record a company would normally keep and I assume probably Borden does not keep it.

Q You did not see it?

A They might compute it from time to time.

Q But you did not see it, did you?

A No, that is right.

Q As an accountant, what is the more realistic, an

average price of Borden brand evaporated milk, reflected in Respondent's Exhibit 76, or the actual prices which compose that average price?

Which is more realistic, if either one is more realistic?

A The average price, of course.

Q Is more realistic?

A There is no question.

Q To you as an accountant?

[2874] A Absolutely.

Q Which is the more realistic, sir? If you don't like the average price or the actual price going into that average?

A Frankly, I think the purchaser is also interested in the average price.

Q Which is the more realistic, sir? If you don't have any idea, you can tell me.

A You better define what you mean by "realistic."

Q I am using it the same way you used it on your direct examination.

A I am afraid I can't follow you on that.

Q What did you mean by realistic, when you used that term in your direct examination?

A Where did I use it, under what circumstance?

Q Well, you used it when you discussed practical and "realistic" of average pricing, broad averaging.

A Well, you say I did. Perhaps I did. What I meant was that this is the kind of information and the kind of consideration which is factual in character, which give business men the kind of information which they need to guide their affairs.

Q All right.

Now with that definition, which is more realistic?

the purchaser of Borden brand evaporated milk, the average price or the actual price is going into that average price?

[2875] A Well, of course, please remember, Mr. Hays, that the average price is nothing more than the actual prices.

Q That is true.

A Obviously the businessman is just as much concerned with the average price that he pays, as he is with any individual actual price on any one transaction.

The average represents his business over a period and this is what determines whether he makes money or loses money. It is not the price he pays on some specific individual transaction, which does not represent more than a small fraction of his total business.

Q So the actual price is just as realistic as the average price, isn't it, from the point of view of the purchaser?

MR. LUKINGBEAL:

Your Honor, I think the witness answered that question fully. I suggest he is arguing with the witness.

MR. HAYS:

I think quite obviously he has not answered it, your Honor. If you think he has answered it, you may so rule. But I don't think he has.

HEARING EXAMINER LIPSCOMB:

I am inclined to think he has. But answer it further, Doctor, if you will.

THE WITNESS:

Well, what Mr. Hays talks about here is the actual price.

As the actual price is of course of importance at **[2876]** a particular moment, or with respect to consideration of a particular transaction. But it does not necessarily, in fact it almost certainly does not reflect an important consideration for the — that is standing by itself — an important consideration for the businessman, who has to run his business not for the moment, but for years. He has to consider his business as a flow of transactions. And precisely what happens with respect to an individual transaction has to be considered in the light of what happens on all transactions.

By Mr. Hays:

Q I am talking about the purchaser now.

A That is right. Purchaser or seller.

Q Which is the more realistic, Doctor, from the point of view of an accountant, the average price — strike that — the average freight costs on all Borden brand milk or the actual freight cost in specific selling situations?

A Well, here the answer is even more obvious, that it is the average freight cost that is of importance. The actual freight cost is merely one arithmetical datum, which goes together to make up the total freight picture and it is the total freight picture or the average freight picture, if you please, that is of importance both to the buyer, and, well, to the seller, assuming he pays it of course.

Q You would have no trouble in determining the actual **[2877]** freight costs on specific sales of Borden

Brand evaporated milk, as reflected in the record in this case, would you?

A Well, I would have no difficulty in making an arithmetical computation, which would show what the freight was on a particular shipment, assuming of course that I had the freight bills and other necessary data. I would not think it would be an item of any very great importance or interest.

* * * *

Q Is there anything, from an accounting point of view, that you consider improper in allocating to an activity a cost when you know for a fact that that specific activity has no cost?

A Would you mind reading that question?

(Question read.)

THE WITNESS:

To me that is a very blind question. I think you would have to have it more concrete before I could answer it.

By Mr. Hays:

Q You can't answer that question?

A It seems to me it is very speculative.

Q Is there anything improper, from an accounting point of [2878] view, in assuming that there is an activity in connection with the sale of a product, when you know for a fact that there is no such activity?

A Well, of course if you put it in those terms, if you really know that there is no such activity, then I think this might be questionable.

* * * *

Volume III
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

THE BORDEN COMPANY

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

**PETITION FOR HABEAS CORPUS FILED MAY 2, 1966
HABEAS CORPUS GRANTED OCTOBER 11, 1966**

(Pages 741 to 851)

COMMISSION'S EXHIBIT No. 30-A

Mr. W. T. Crowe
Atlanta Office

A. J. Berry, Jr.

CONFIDENTIAL

May 31, 1957

Dear Bill:

During the past few weeks, in response to earnest solicitation by customers, we have accepted additional Private Label Evaporated Milk business in your Division. Specifically, we have taken on the following accounts:

Account	Plant	Brand	Whse. Point	Est. Yr. Vol.
Consolidated Co.	Lewisburg	Autocrat	New Orleans	9,000
Thomas & Howard	Chester	Table Hints	Salisbury, N.C.	5,000
Thomas & Howard	Lewisburg	Table Hints	Macon, Ga.	5,000
Winn-Dixie	Chester	Dixie Home	Greenville, S.C.	50,000
Colonial Stores	Chester	C. S.	Columbia, S.C.	
Colonial Stores	Chester	C. S.	Raleigh, N.C.	
Colonial Stores	Lewisburg	C. S.	Atlanta, Ga.	

In connection with Colonial, their total yearly volume is 125,000 cases *including* the Norfolk, Virginia warehouse. As we don't have a breakdown as yet, we couldn't give you the volume at each point. We have already shipped to Thomas & Howard, Salisbury.

We hold orders to be shipped during the first half of June for Winn-Dixie, Greenville; for Colonial, Atlanta, Columbia and Raleigh, and for Thomas & Howard, Macon, also for Consolidated Co.

Our policy, Bill, has *not* changed with respect to P. L. We have *not* solicited any business and do not intend doing so. We have, however, looked at what has been offered and have accepted some on a permanent basis where it fitted into our production situation and long term plans.

In keeping with our policy, we will pay brokerage on the above of 2-1/2c per case Tall Size basis. Naturally, you will want to notify any Brokers concerned so they will be posted. In doing so, Bill, please cover the following:

1. They will have no duties to perform on this P. L. business. They will not have to pick up orders, make out invoices, etc. Everything will be handled by the Home Office

COMMISSION'S EXHIBIT No. 30-B

2. If the P. L. customer should try to discuss their P. L. business with our Broker (or with any Borden Representative), he should indicate that he has no knowledge of the details and is, therefore, not in a position to discuss the matter. Our Brokers *should not* bring up the subject themselves.

3. The Broker will receive 2-1/2 cents per case credit on the regular Commission Statement for all shipments.

4. Should any account approach a Broker about packing P. L. Evap, no commitment should be made. The inquiry, with all available details, should be referred to you for further reference to the Home Office. We do *not* wish Brokers to solicit such business.

If we get any additional business, I'll let you know all the details.

With best regards.

A. J. BERRY, JR.

AJB:ED

cc: S. D. Thompson
O. D. Hall

9186-1

SALES DEPARTMENT

RD 2/11/57
DIXON ILLCUSTOMER'S ORDER NO. 51274
8048SALES REPRESENTATIVE
#2501

2/21/57

10220

TOPCO ASSOCIATES, INC.
431 SO DEARBORN ST
CHICAGO 5, ILLFEDERAL TRADE COMMISSION
IN THE MATTER OF *Topco Associates, Inc.*
V. *Wines*
AGS REPORTING CO. - DALLAS, TEXASBIG BEAR STORES
770 W GOODALE BLVD
COLUMBUS, OHIO

ICC - CHGO - PRR

NET

AMOUNT

1166 FOOD CLUB TALL EVAP

0725

5.2256

COND & EVAP MILK
SUBJECT TO 1/10 OF
1% SWELL ALLOWANCE

6093 05

BASIC CHARGES

1.92

CARTONS

1.11

ACTUAL MILK COST

3.0716

HAULING

.04

LABELS

.083

5.2256

COST OF FREIGHT

6352 92

3376

THE DUREN FOOD PRODUCT COMPANY
DIVISION OF THE DUREN COMPANY

1443

Pg 3383

193564

12/10/37

SHIPPED TO 11/29/37 CUSTOMER'S ORDER NO. OUR ORDER NO. SALES REPRESENTATIVE
FROM LEWISBURG TENN 3 35762 21244 2501

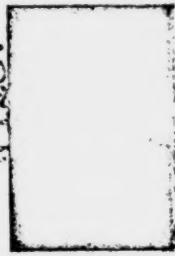
11257

BUCKLE PURCHASING CO
300 W. ADAMS ST
CHICAGO 6 ILL

COMMISSION EXHIBIT NO. 1637
FEDERAL TRADE COMMISSION
DOCKET NO. 7179
WITNESS
DATE 12/10/37
IN RE MATTER OF THE Borden Food Products Company
AGE REPORTING CO. ORIGIN REPORTING CO.

COLONIAL STORES
COLUMBUS OHIO

SHIPPED TO
ADDRESS
ROUTED



GENERAL SHEET NO.

NET

TERMS
CASH ON DELIVERY
REMITTANCE TO BE MADE TO
311 MADISON AVE., NEW YORK
10, N. Y. IN FIVE PAYABLE
AT 15%

CASE'S	SIZE, PACK AND BRAND	STOCKING	PRICE	TRADE DISCOUNT	AMOUNT
700	C.S. TALL. EVAP	0828	4.999		3499 80
	BASIC CHARGES				
	EARTONS				3499 80
	HAULING				273 60
	ACTUAL MILK COST				3774 50
	TALL				
	1.93				
	.108				
	.09				
	2.521				
	4.999				
	EVAP MILK SUBJECT				
	TO 1/10 OF 1% MELL				
	ALLOWANCE				
	DIVERSION CHARGE				
	COST OF FREIGHT				

ALL 1937 INVOICE

THE BORDEN FOOD PRODUCTS COMPANY
DIVISION OF THE BORDEN COMPANY

3564

1637

63-11

DATE SHIPPED: 12/10/51

CUSTOMER'S ORDER NO. OUR C&V: NO. 26749

2039
CLASSIFICATION

11355

ADDRESSES

MIDDLE, PURCHASING CO
300 W. ADAMS ST
CHICAGO 6 ILL

SA 66-10000
FEDERAL TRADE COMMISSION
COMMISSION EXHIBIT NO. 10000
WITNESS: CO., ORDERS: 10000

Reported by _____

ADDRESS
CITY

MCCARTY - HOL
JACKSON, MISS

GENERAL
OFFICE
SHEET NO. 1
T-103

ROUTE

PAGES

525

JUNGLE QUEEN TALL EVAP

BASIC CHARGES	1.98
CARTONS	.106
HAULING	.99
ACTUAL MILK COST	2.521
	<u>4.559</u>

0937

4.999
EVAP MILK SUBJECT
TO 1/10 OF MSWELL
ALLOWANCE.

3124 28

3121 26

FROM INVENT

3565

1633

THE BORDEN FOOD PRODUCTS COMPANY
DIVISION OF THE BORDEN COMPANY

7

SHIPPED FROM PERRIN TON MICH

CUSTOMER'S ORDER NO. OUR ORDER NO.

51253 7310 2501

TOPCO ASSOCIATES INC
431 S DEARBORN ST
CHICAGO 5 ILLINOIS

SHIP TO ADDRESS

FEDERAL TRADE COMMISSION
EXHIBIT NO. 1918
DOCKET NO. 714
MATTER OF THE BORDEN CO.
OFFICIAL REPORTER
BIG BEAR STORES
770 W DOCCALE BL
COLUMBUS OHIO

SHIP TO ADDRESS

SHIP TO ADDRESS

SHIP TO ADDRESS

SHIP TO ADDRESS

1151 TALL FOOD CLUB EVAP

BASIC CHARGES 1.92
CARTONS .111
ACTUAL MILK COST 3.1067
HAULING .04
LABELS .083
5.2607

0725

5.2607

CORD & EVAP MILK
SUBJECT TO 1% OF
1% SWELL ALLOWANCE

COST OF CIXON FRY.

6055.07

6.06

634.75

FACTORY DIVISION

THE BORDEN FOOD PRODUCTS COMPANY
DIVISION OF THE BORDEN COMPANY

3850

1918

8

VOLUME OF BORDEN LABEL

EVAPORATED MILK SALES

1956	4,356,332 cases
1957	4,314,415 cases

The foregoing are tall case equivalents.
A tall case is 48 tall cans. A case of 96 small
cans counts as one in the above figures. A case
of 48 small cans counts as one-half.

P. O. Box 1540, Fort Worth, Texas

COMMISSION'S EXHIBIT No. 2173-A

DATE	INVOICE	No. CASES	BRAND	VALUE*
ALBUQUERQUE				
April 6, 1958	C041161	350	Elite	2047.50
July 9	C-41538	250	"	1500.00
Sept. 16	C-41790	400	"	2400.00
Dec. 6	C-42154	500	"	3015.00
Feb. 3, 1958	C-42429	200	"	1230.00
		1700		10192.50

SANTA FE				
Jan. 12, 1957	C-40759	200	Elite	1170.00
April 6	C-41138	200	"	1170.00
July 9	C-41539	350	"	2100.00
Sept. 16	C-41791	150		900.00
		900		5340.00

LAS VAGAS				
April 6, 1957	C-41139	100	Elite	585.00
July 9	C-41540	50	"	300.00
Sept. 16	C-41792	100	"	600.00
		250		1485.00

Total all houses 2800 cases
\$ 1485.00 value

* Amount of invoices before any deduction for freight, labels or discount.

FEDERAL TRADE COMMISSION
DOCKET NO. 7239 COMMISSION EXHIBIT NO. 2173A
IN THE MATTER OF *7th Reg'd*
DATE *9/23/55* WITNESS *Legal*
ACE REPORTING CO., Official Reporter
By *12*

2173a

4129

KIMBELL GROCERY COMPANY
P. O. Box 1540, Fort Worth, Texas

Sales January 1, 1957-April 22, 1958

FORT WORTH
DATE

	<u>INVOICE</u>	<u>NO. CASES</u>	<u>BRAND</u>	<u>VALUE</u>
July 22, 1957	C-41571	50	Page	317.50
Nov. 19	C-42069	350		2082.50
Jan. 20, 1958	C-42333	<u>100</u> 500		<u>610.00</u> 3010.00

AMARILLO

Feb. 26, 1957	C-40999	150	Page	877.50
June 11	C-41394	25		150.00
Aug. 9	C-4677	<u>25</u> 200		<u>150.00</u> 1177.50

SWEETWATER

Feb. 25	C-40938	100	Page	585.00
June 15	C-41434	50		300.00
Aug. 17	C-41670	50		300.00
Dec. 21	C-42151	50		307.50
Jan. 15, 1958	C-42298	<u>50</u> 300		<u>307.50</u> 1800.00
		<u>1000</u>		<u>\$5987.50</u>

Above invoices cover evaporated milk only. Amount of invoice before any deductions for freight or label allowance or discount.

126 West Fourth St.
San Angelo, Texas

Sales January 1, 1957-August 31, 1958

<u>DATE</u>	<u>INVOICE #</u>	<u>NO. CASES</u>	<u>BRAND</u>	<u>VALUE *</u>
June 15, 1957	C-41427	400	NANCEE	2380.00
July 15,	C-41547	400	"	2380.00
Aug. 17	C-41673	400	"	2380.00
Sept. 7	C-41745	475	"	2826.25
Oct. 15	C-41929	400	"	2380.00
Nov. 16	C-42033	550	"	3272.50
Dec. 12	C-42179	400	"	2440.00
Jan. 15, 1958	C-42291	400	2	2440.00
Feb. 11	C-42449	400	"	2440.00
Mar. 12	C-42590	400	"	2440.00
		<u>4225</u>		<u>25378.75</u>

*Amount of invoice before any deductions for freight, label allowance or discount.

FEDERAL TRADE COMMISSION
DOCKET NO. 7129 COMMISSION EXHIBIT NO. 2174
IN THE MATTER OF The Boyden Co.
DATE 7/23/58 WITNESS Keith
ACE REPORTING CO., Official Reporter
By 1, 62

WINN DIXIE-HILL, INC.
1001 E. Broad St., New Orleans, 10, La.

DATE	INVOICE	TALL CS.	BABY CS.**	BRAND	VALUE*
June 22, 1957	C-41408	700		Velva	\$ 4165.00
July 3	C-41470	650	50	"	4165.00
Aug. 3	C-41634	675	25	"	4165.00
Sept. 9	M-24082	1075	125	"	7140.00
Nov. 8	C-41975	675		"	4016.25
Dec. 2	C-42127	600	100	"	4165.00
10	C-42128	600	50	"	3867.50
Jan. 25, 1958	C-42388	625		"	4117.50
March 3	M-25146	700	50	"	4422.50
24	C-42594	680	25	"	4148.00
May 5	C-42809	680		"	4046.00
June 24	C-43001	675		"	4016.25
		<u>8335</u>	<u>425</u>		<u>52434.00</u>

* Amount of invoices before any deductions are made for freight, labels, or discount.

**Cases of Baby 48's listed as 1/2 cases.

FEDERAL TRADE COMMISSION
DOCKET NO. 77-278 COMMISSION EXHIBIT NO. 2175
IN THE MATTER OF I & B, Inc.
DATE 9/23/58 WITNESS [Signature]
ACE REPORTING CO., Official Reporter
By [Signature]

CUSTOMER

Morris Siegel
80 S. Pennsylvania Ave.,
Wilkes-Barre, Pa.

<u>DATE OF INVOICE</u>	<u>NO. CASES</u>	<u>NET AMT. OF INVOICE</u>
3-18-1957	230 T 20 #10	1441.20
4-25-1957	290 T 10 #10	1725.10
10-10-1957	275 T 25 #10	1726.75
11- 6-1957	25 #10	153.75
11-19-1957	263 T 15 #10	1596.61
12-19-1957	300 T	1761.00
2- 4-1958	300 T	1761.00
TOTALS	1,753 cs.	\$10,165.41

B
B
W
B
W
W
W

757

COMMISSION'S EXHIBIT No. 2176

FEDERAL TRADE COMMISSION
EXHIBIT NO. 2176
DOCKET NO. 1-1-1
IN THE MATTER OF
WITNESS
DATE
ACE REPORTING CO., OFFICIAL REPORTER
BY

2176

4133

CUSTOMER

Banker & Williams Co.,
Cliff Street & Bogart Place
Scranton, Pa.

<u>DATE OF INVOICE</u>	<u>NO. CASES</u>	<u>NET AMOUNT OF INVOICE</u>
4- 1-1957	540	3099.60
5- 2-1957	600	3444.00
6- 2-1957	600	3432.00
7-11-1957	600	3372.00
8-14-1957	600	3420.00
9-17-1957	600	3480.00
10-10-1957	10 - #10's	61.50
10-28-1957	600	3480.00
11-26-1957	600	3480.00
1- 5-1958	600	3570.00
2- 2-1958	600	3570.00
3-11-1958	600	3570.00
TOTALS	6,550	\$37,979.10

B B W W W B W W W B W B W

COMMISSION'S EXHIBIT No. 2177

FEDERAL TRADE COMMISSION
DOCKET NO. 7-1-1957 EXHIBIT NO. 2177
IN THE MATTER OF _____
WITNESS _____
DATE _____
ACE REPORTING CO., Official Reporter
By _____

DATE THURSDAY, APRIL 19, 1956
 ACC REPORTING CO., OFFICIAL REPORTER
 By ---

<u>CUSTOMER</u>	<u>DATE OF INVOICE</u>	<u>NO. CASES</u>	<u>NET AMT. OF INVOICE</u>	
Liberal Markets Dayton, Ohio.	3-14-1956	500	2690.00	L
	5-14-1956	600	3168.00	W
	10-16-1956	600	3252.00	L
	11-28-1956	600	3252.00	L
	2-27-1957	600	3312.00	W
TOTALS		2,900 cs.	\$15,674.00	

2178

COMMISSION'S EXHIBIT No. 2179

<u>CUSTOMER</u>	<u>DATE OF INVOICE</u>	<u>NO. CASES</u>	<u>NET AMT. OF INVOICE</u>	
Tusco Grocers, Inc., Uhrichsville, Ohio.	4-20-1956	25 Keystone 200 Shurfine	133.67 1046.32	B
	5-18-1956	200 Shurfine	1046.32	B
	6-8 -1956	35 Keystone 200 Shurfine	187.14 1046.32	B
	6-22-1956	200 Shurfine	1096.27	B
	7-27-1956	35 Keystone 200 Shurfine	195.89 1096.27	B
	8-24-1956	25 Keystone 200 Shurfine	139.92 1096.27	B
	9-14-1956	25 Keystone 200 Shurfine	139.92 1096.27	B
	10- 5-1956	35 Keystone 200 Shurfine	195.89 1094.27	B
	10-26-1956	25 Keystone 200 Shurfine	139.92 1096.27	B
	11-16-1956	25 Keystone 200 Shurfine	139.92 1096.27	B
	12-12-1956	25 Keystone 200 Shurfine	139.92 1096.27	B
	12-27-1956	25 Keystone 200 Shurfine	139.92 1096.27	B
	1-11-1957	25 Keystone 200 Shurfine	139.92 1096.27	B
	2- 1-1957	25 Keystone 200 Shurfine	139.92 1096.27	B
	2-22-1957	25 Keystone 200 Shurfine	139.92 1096.27	B
	2-27-1957	200 Shurfine	1096.27	B
	3- 7-1957	25 Keystone 225 Shurfine	139.92 1233.30	B
	TOTALS	3,805 cs.	\$20,733.56	

FEDERAL TRADE COMMISSION
 RECEIVED
 IN THE MATTER OF
 BUSINESS REPORTING CO.
 OFFICIAL REPORTS
 7-27-1956

WITNESS
ACE REPORTING CO., Official Reporter
By

CUSTOMER

Star Markets
540 Gallivan Blvd.,
Dorchester, 24, Mass.

DATE OF INVOICE NO. CASES NET AMT. OF INVOICE

2-15-1955	500	2665.00	L
3-11-1955	500	2665.00	L
11-28-1955	500	2665.00	B
1-20-1956	600	3288.00	L
TOTALS	2,100 cs.	\$11,283.00	

761

COMMISSION'S EXHIBIT No. 2180

18 P. 2137

FEDERAL TRADE COMMISSION
 DOCKET NO. 17,179 RECEIVED NO. 211
 IN THE MATTER OF *Supreme Markets*
 DATE *1-14-1956* WITNESS *[Signature]*
 ACT REPORTING CO., Official Reporter
 By *[Signature]*

<u>CUSTOMER</u>	<u>DATE OF INVOICE</u>	<u>NO. CASES</u>	<u>NET AMT. OF INVOICE</u>	
Supreme Markets 470 Broadway South Boston, Mass.	10-20-1955	400 T 50 B	2307.75	L
	1-14-1956	400 T	2192.00	L
	1-20-1956	250 T	1370.00	L
	6-11-1956	450 T	2421.00	L
	TOTALS	1,525 cs.	\$9,290.75	

DATE _____
 ACE REPORTING CO., Official Reporter
 By _____

CUSTOMER

George C. Shaw Co.,
 540 Gallivan Blvd.,
 Dorchester 24, Mass.

<u>DATE OF INVOICE</u>	<u>NO. CASES</u>	<u>NET AMT. OF INVOICE</u>	
3-11-1955	300	1599.00	L
11-28-1955	200	1066.00	B
1-14-1956	400	2192.00	L
2-29-1956	350	1918.00	L
TOTALS	1,250 cs.	\$6,775.00	

COMMISSION'S EXHIBIT No. 2182

20

7-2139

FEDERAL TRADE COMMISSION
 CASE NO. 77-114-1955 EXHIBIT NO. 2183
 IN THE MATTER OF *Public Markets*
 DATE *10-20-1955* WITNESS *[Signature]*
 ACE REPORTING CO., Official Reporter
 By *[Signature]*

CUSTOMER

Brockton Public Markets
 157 Main Street
 Brockton, Mass.

<u>DATE OF INVOICE</u>	<u>NO. CASES</u>	<u>NET AMT. OF INVOICE</u>
10-20-1955	250	1357.50 L
1-14-1956	300	1644.00 L
6-11-1956	250	1345.00 L
TOTALS	800 cs.	\$4,346.50

Customer

DATE OF INVOICE

NO. CASES

NET AMT. OF INVOICE

Pick-N-Pay Super Mkts.,
3621 Chester Avenue
Cleveland, Ohio.

5-11-1956
6-15-1956
7-12-1956
10- 8-1956
10-22-1956
11- 2-1956
11-28-1956
12-17-1956

1-14-1957

2- 1-1957
2-28-1957

3-14-1957
3-18-1957

4- 3-1957

400
400
400
400
400
400
400
400

400

400
400

164
236

400

2112.00
2112.00
2152.00
2168.00
2168.00
2168.00
2168.00
2208.00

2208.00

2208.00
2208.00

905.28
1302.72

2208.00

L
L
L
L
L
L
L
L

L

L
L

L
L

L

TOTALS

X 5,200 cs.

\$28,296.00

COMMISSION'S EXHIBIT No. 2184

22 21-8-61
4141

FEDERAL TRADE COMMISSION
 DOCKET NO. 7149 *EXHIBIT NO. 2185*
 IN THE MATTER OF *Union Fruit Co., Inc.*
 DATE *9/24/57* WITNESS *A. J. [Signature]*
 ACE REPORTING CO., Official Reporter
 By *[Signature]*

CUSTOMER

The Penn Fruit Co., Inc.,
 P. O. Box 6122
 Philadelphia, Pa.

DATE OF INVOICE NO. CASES NET AMT. OF INVOICE

6-17-1955	1500 T 500 B	9240.00	W
10-15-1955	1500 T 200 B	8528.00	L
11-15-1955	1200 T 200 B	6929.00	W
1-17-1956	700 T 280 B	4603.20	L
2-17-1956	1200 T 500 B	7946.00	L
6- 9-1956	1200 T 100 B	6850.00	L

TOTALS 8,190 cs. \$44,096.20

CUSTOMER

Hart Food Stores, Inc.,
175 Humboldt Street
Rochester, N. Y.

<u>DATE OF INVOICE</u>	<u>NO. CASES</u>	<u>NET AMT. OF INVOICE</u>	
3-24-1955	1000 T 125 B	5556.87	L
4-20-1955	1000 T 100 B	5491.50	L
11-1 -1955	700 T 350 B	4576.25	L
11-21-1955	1000 T	5230.00	L
1-11-1956	1000 T	5380.00	L
2-27-1956	1000 T 184 B	5874.96	L
TOTALS	6,080 cs.	\$32,109.58	

COMMISSION'S EXHIBIT No. 2186

24 2 4143

COMMISSION'S EXHIBIT No. 2187

CUSTOMER	DATE OF INVOICE	NO. CASES	NET AMT. OF INVOICE	
Big Bear Stores Co., 770 W. Goodale Street Columbus 8, Ohio	1-7-1956	500	2605.02	W
	1-13-1956	500	2605.02	W
	1-19-1956	500	2605.02	W
	2-4-1956	500	2605.02	W
	2-10-1956	500	2605.02	W
	2-17-1956	500	2605.02	W
	2-23-1956	500	2605.02	W
	3-1-1956	500	2605.02	W
	3-14-1956	500	2605.02	W
	3-21-1956	500	2605.02	W
	3-28-1956	500	2605.02	W
	4-12-1956	500	2605.02	W
	4-19-1956	500	2605.02	W
	4-26-1956	500	2605.02	W
	5-9-1956	500	2605.02	W
	5-16-1956	500	2605.02	W
	5-24-1956	500	2605.02	W
	5-31-1956	500	2605.02	W
	6-8-1956	500	2605.02	W
	6-19-1956	500	2605.02	W
	8-7-1956	500	2730.02	W
	9-7-1956	500	2730.02	W
	11-7-1956	500	2625.00	W
	11-15-1956	500	2680.02	W
	11-23-1956	600	3150.00	W
	11-29-1956	600	3150.00	W
	12-12-1956	500	2625.00	W
	12-20-1956	500	2625.00	W
	12-28-1956	500	2675.00	W
	1-4-1957	500	2675.00	W
TOTALS		15,200 cs.	\$79,765.46	

FEDERAL TRADE COMMISSION
 RECEIVED JAN 13 1957
 IN THE MATTER OF
 WITNESS
 OFFICIAL REPORTS
 BY
 DATE
 ACE REPORTING CO.

COLONIAL STORES, INC.

P. O. BOX 4435
ATLANTA, GEORGIA

(Shipped to Thomasville, Ga.)

ACE REPORTING CO., Official Reporter

By

27
0

COMMISSION'S EXHIBIT No. 2188

<u>Date Shipped</u>	<u>Cases 14$\frac{1}{2}$oz.</u>	<u>Cases 6 oz.</u>	<u>Pounds</u>	<u>Gallonage</u>	<u>Value</u>
May, 1956	650	150	30,975	3,484	\$ 4,023.75
June, 1956	---	---	---	---	---
July, 1956	675	130	31,703	3,566	4,107.00
Aug., 1956	---	---	---	---	---
Sept., 1956	---	---	---	---	---
Oct., 1956	675	150	32,063	3,607	4,350.00
Nov., 1956	---	---	---	---	---
Dec., 1956	---	---	---	---	---
Jan., 1957	650	150	30,975	3,484	4,205.00
Feb., 1957	---	---	---	---	---
Mar., 1957	---	---	---	---	---
Apr., 1957	<u>675</u>	<u>100</u>	<u>31,163</u>	<u>3,505</u>	<u>4,205.00</u>
Totals	3325	680	156,879	17,646	\$ 20,890.75

Last Shipment: April, 1957

17,646

FEDERAL TRADE COMMISSION

DOCKET NO. 7149 ~~EXHIBIT NO. 2189~~

IN THE MATTER OF *The Boston Co.*

DATE *8/14/57* WITNESS *John J. [illegible]*

ACE REPORTING CO., Official Reporter

By *[Signature]*

COLONIAL STORES, INC.

P. O. BOX 4358

ATLANTA, GEORGIA

(Shipped to East Point, Ga)

COMMISSION'S EXHIBIT No. 2189

<u>Date Shipped</u>	<u>Cases 14 1/2 oz.</u>	<u>Cases 6 oz.</u>	<u>Pounds</u>	<u>Gallons</u>	<u>Value</u>
Dec., 1956	700	120	32,610	3,668	\$ 4,408.00
Jan., 1957	700	150	33,150	3,729	4,495.00
Feb., 1957	630	200	31,005	3,488	4,234.00
Mar., 1957	700	200	34,050	3,830	4,640.00
Apr., 1957	650	200	31,875	3,585	4,350.00
May, 1957	---	---	---	---	---
June, 1957	---	---	---	---	---
July, 1957	1100	250	52,350	5,889	7,288.75
Aug., 1957	---	---	---	---	---
Sept., 1957	---	---	---	---	---
Oct., 1957	---	---	---	---	---
Nov., 1957	<u>550</u>	<u>360</u>	<u>30,405</u>	<u>3,420</u>	<u>4,124.50</u>
Totals	5030	1480	245,445	27,609	\$ 33,540.25

Date Transferred: December, 1957

For the year of 1956 this customer bought a total of 9610 cs. 14 1/2 oz., 1970 cs. 6 oz. or an average per month of 800 cs. 14 1/2 oz. and 164 cs. 6 oz.

ACC REPORTING CO., Official Reporter
By LS

P. O. BOX 1113
COLUMBIA, S. CAROLINA
(shipped to Raleigh, N.C.)

COMMISSION'S EXHIBIT No. 2190

<u>Date Shipped</u>	<u>Cases 14 1/2 oz.</u>	<u>Cases 6 oz.</u>	<u>Pounds</u>	<u>Gallons</u>	<u>Value</u>
May, 1956	775	125	35,963	4,045	\$ 4,648.13
June, 1956	1550	250	71,925	8,091	9,296.26
July, 1956	---	---	---	---	---
Aug., 1956	---	---	---	---	---
Sept., 1956	825	135	38,318	4,310	5,176.50
Oct., 1956	610	210	30,315	3,410	4,147.00
Nov., 1956	700	50	31,350	3,526	4,209.00
Dec., 1956	700	200	34,050	3,830	4,640.00
Jan., 1957	665	140	31,448	3,537	4,263.00
Feb., 1957	655	100	30,293	3,408	4,089.00
Mar., 1957	700	100	32,250	3,628	4,350.00
Apr., 1957	<u>825</u>	<u>125</u>	<u>38,138</u>	<u>4,290</u>	<u>5,147.50</u>
Totals	6005	1435	374,050	42,075	\$ 49,962.39

Date Transferred: May, 1957

FEDERAL TRADE COMMISSION
DOCKET NO. 714 COMMISSION EXHIBIT NO. 2191
IN THE MATTER OF *Colonial Stores, Inc.*
 DATE *9/24/57* **WITNESS** *[Signature]*
COLONIAL STORES, INC. **ACE REPORTING CO., Official Reporter**
 321 DUNMORE ST. **By** *[Signature]*
 NORFOLK, VIRGINIA

<u>Date Shipped</u>	<u>Cases 14 1/2 oz.</u>	<u>Cases 6 oz.</u>	<u>Pounds</u>	<u>Gallons</u>	<u>Value</u>
Oct., 1955	---	---	---	---	---
Nov., 1955	1100	200	51,450	5,787	6,600.00
Dec., 1955	1100	200	51,450	5,787	6,600.00
Jan., 1956	---	---	---	---	---
Feb., 1956	---	---	---	---	---
Mar., 1956	---	---	---	---	---
Apr., 1956	---	---	---	---	---
May, 1956	1060	250	50,610	5,693	6,576.75
June, 1956	1060	250	50,610	5,693	6,576.75
July, 1956	---	---	---	---	---
August, 1956	---	---	---	---	---
Sept., 1956	1080	200	50,580	5,689	6,576.75
Totals	5400	1100	254,700	28,649	\$ 33,197.50

COMMISSION'S EXHIBIT No. 2191

Date Transferred: October, 1956

By

47
0

CROSS, ABBOTT CO.
P. O. BOX 710
WHITE RIVER JUNCTION, VERMONT

Date Shipped	Cases 14 1/2 oz.	Cases 6 oz.	Pounds	Gallonsage	Value
May, 1957	800	30	35,340	3,976	4,727.00
June, 1957	700	40	31,170	3,506	4,284.00
July, 1957	700	60	31,530	3,546	4,343.50
Aug., 1957	700	30	30,990	3,486	4,254.25
Sept., 1957	---	---	---	---	---
Oct., 1957	800	30	35,340	3,976	4,849.25
Nov., 1957	700	40	31,170	3,506	4,284.00
Dec., 1957	---	---	---	---	---
Jan., 1958	750	30	33,165	3,731	4,551.75
Feb., 1958	---	---	---	---	---
Mar., 1958	---	---	---	---	---
Apr., 1958	700	25	30,900	3,476	4,132.50
Totals	5850	285	259,605	29,203	35,426.25

COMMISSION'S EXHIBIT No. 2192

Date Transferred: May, 1958

4149

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COMMISSION'S EXHIBIT No. 2194

DOCKET NO. 7194

IN THE MATTER OF *the Estate of J. H. Dunne*

DATE *4/2/57* WITNESS *J. H. Dunne*

ACE REPORTING CO., Official Reporter

By *J. H. Dunne*

H. DUNNE CO.
54 E. MAIN ST.
NORWICH, N.Y.

<u>Date Shipped</u>	<u>Cases 14 1/2 oz.</u>	<u>Cases 6 oz.</u>	<u>Pounds</u>	<u>Gallons</u>	<u>Value</u>
May, 1956	---	---	---	---	---
June, 1956	---	---	---	---	---
July, 1956	---	---	---	---	---
Aug., 1956	---	---	---	---	---
Sept., 1956	---	---	---	---	---
Oct., 1956	1500	150	67,950	7,643	9,135.00
Nov., 1956	---	---	---	---	---
Dec., 1956	2525	250	114,338	12,861	15,370.00
Jan., 1957	1400	100	62,700	7,053	8,410.00
Feb., 1957	1400	100	62,700	7,053	8,410.00
Mar., 1957	1400	200	64,500	7,255	8,700.00
Apr., 1957	2800	200	125,400	14,106	16,820.00
Totals	11025	1000	497,588	55,971	66,845.00

Date Transferred: May, 1957

HANNAFORD BROTHERS CO.
 17 CROSS ST.
 PORTLAND, MAINE
 (del. to: Portland, Me.
 Biddeford, Maine
 Rumford, Maine
 Winslow, Maine
 Lewiston, Maine)

DATE 9-20-57 WITNESS *[Signature]*
 ACC REPORTING CO., Official Reporter
 By *[Signature]*

COMMISSION'S EXHIBIT No. 2195

Date Shipped	Cases <u>14 oz.</u>	Cases <u>6 oz.</u>	Pounds	Gallons	Value
Dec., 1955	5,450	70	238,335	26,809	\$ 30,167.50
Jan., 1956	1,255	50	55,493	6,242	7,232.00
Feb., 1956	3,595	50	157,283	17,692	20,162.00
Mar., 1956	2,565	30	112,118	12,612	14,319.00
Apr., 1956	1,450	50	63,975	7,196	8,186.26
May, 1956	-----	---	-----	-----	-----
June, 1956	-----	---	-----	-----	-----
July, 1956	-----	---	-----	-----	-----
Aug., 1956	700	35	31,080	3,496	4,161.50
Sept., 1956	1,350	200	62,325	7,011	8,410.00
Oct., 1956	1,370	150	62,295	7,007	8,381.00
Nov., 1956	-----	---	-----	-----	-----
Totals	<u>17,735</u>	<u>635</u>	<u>782,904</u>	<u>88,065</u>	<u>\$101,019.26</u>

Last Shipment: October, 1956

FEDERAL TRADE COMMISSION
COCKET NO. 1121 **COMMISSION EXHIBIT NO. 2196**

IN THE MATTER OF
 DATE 9/24/57 WITNESS
 ACE REPORTING CO., Official Reporter

By
MILLIKEN, TOLLINSON CO.
P. O. BOX 1941
PORTLAND, MAINE
 (Del. to: Portland, Me.
 Presque Isle, Me.
 Bangor, Maine
 Lewiston, Maine)

COMMISSION'S EXHIBIT No. 2196

<u>Date Shipped</u>	<u>Cases 14 oz.</u>	<u>Cases 6 oz.</u>	<u>Pounds</u>	<u>Gallons</u>	<u>Value</u>
March, 1957	3,930	105	172,845	19,443	23,098.50
April, 1957	5,720	395	255,930	28,789	34,321.50
May, 1957	710	10	31,065	3,494	4,147.00
June, 1957	3,060	40	133,830	15,054	18,326.00
July, 1957	3,810	200	169,335	19,048	23,264.51
Aug., 1957	3,560	200	158,460	17,825	21,777.01
Sept., 1957	2,335	150	104,273	11,730	14,339.50
Oct., 1957	1,910	80	84,525	9,508	11,602.50
Nov., 1957	4,210	163	186,159	20,940	25,549.30
Dec., 1957	3,892	79	170,724	19,204	23,392.43
Jan., 1958	4,610	222	204,531	23,007	28,089.95
Feb., 1958	<u>3,335</u>	<u>120</u>	<u>147,233</u>	<u>16,562</u>	<u>20,200.25</u>
Totals	41,082	1769	1,818,910	204,604	248,108.45

Date Transferred: March, 1958

COMMISSION'S EXHIBIT No. 2197

ONELDA MARKETS
RAILROAD AVE.
ALBANY, NEW YORK

By

<u>Date Shipped</u>	<u>Cases 14 1/2 oz.</u>	<u>Cases 6 oz.</u>	<u>Pounds</u>	<u>Gallonage</u>	<u>Value</u>
Dec., 1956	---	---	---	---	---
Jan., 1957	710	---	30,885	3,474	4,118.00
Feb., 1957	710	---	30,885	3,474	4,118.00
Mar., 1957	---	---	---	---	---
Apr., 1957	1420	---	61,770	6,948	8,236.00
May, 1957	---	---	---	---	---
June, 1957	---	---	---	---	---
July, 1957	---	---	---	---	---
Aug., 1957	---	---	---	---	---
Sept., 1957	710	---	30,885	3,474	4,224.50
Oct., 1957	---	---	---	---	---
Nov., 1957	<u>710</u>	<u>---</u>	<u>30,885</u>	<u>3,474</u>	<u>4,224.50</u>
Totals	4260	---	185,310	20,844	\$ 24,921.00

Last Shipment: November, 1957

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4153
34 2

FEDERAL TRADE COMMISSION

DOCKET NO. 104 COMMISSION EXHIBIT NO. 2198

IN THE MATTER OF *Richardson*

DATE *2/28/56* WITNESS *Richardson*

ACE REPORTING CO., Official Reporter

By

T. R. SAVAGE CO.
120 RICE ST.
BANGOR, MAINE

COMMISSION'S EXHIBIT No. 2198

Date Shipped	Cases 14 oz.	Cases 6 oz.	Pounds	Gallons	Value
Feb., 1955	2,910	---	126,585	14,239	\$ 16,005.00
Mar., 1955	2,200	75	97,050	10,917	12,306.25
April, 1955	2,130	---	92,655	10,422	11,715.00
May, 1955	2,110	40	92,505	10,406	11,573.00
June, 1955	2,460	25	107,460	12,038	13,351.50
July, 1955	2,985	25	130,293	14,657	16,136.50
Aug., 1955	2,225	125	99,033	11,140	12,581.25
Sept., 1955	2,150	75	94,875	10,672	12,031.25
Oct., 1955	1,435	---	62,423	7,022	7,392.50
Nov., 1955	3,030	25	132,255	14,876	16,733.75
Dec., 1955	3,615	50	153,153	17,790	20,195.83
Jan., 1956	<u>3,485</u>	<u>25</u>	<u>152,048</u>	<u>17,103</u>	<u>19,760.88</u>
Totals	30,735	465	1,345,345	151,332	\$170,332.76

Date Transferred: February, 1956

COMMISSION'S EXHIBIT No. 2199

<u>Date Shipped</u>	<u>Cases 14 1/2 oz.</u>	<u>Cases 6oz.</u>	<u>Pounds</u>	<u>Gallons</u>	<u>Value</u>
April, 1957	---	---	---	---	---
May, 1957	200	---	8,700	979	1,160.00
June, 1957	---	---	---	---	---
July, 1957	---	---	---	---	---
August, 1957	---	---	---	---	---
Sept., 1957	---	10	180	20	30.25
Oct., 1957	---	---	---	---	---
Nov., 1957	---	20	360	40	60.50
Dec., 1957	---	---	---	---	---
Jan., 1958	---	---	---	---	---
Feb., 1958	---	---	---	---	---
Mar., 1958	<u>10</u>	<u>20</u>	<u>795</u>	<u>89</u>	<u>121.00</u>
Totals	210	50	10,035	1,128	1,371.75

Date Transferred: April, 1958

Wipie Home Store

**PREPAID
COLLECT**

Greenville, South Carolina

Biddle

2% 10d

Dixie Home

allow 1.7 Swell Allowance

ROUTING CMSTP+P

Monon. Southern

DATE	INV. NO.	NUMBER OF CASES				GROSS BILLING	LABELS	FREIGHT	BROK.	DISCOUNT	RETURN & ALLOW.	DECLINE	PER CASE GROSS
		TALL	48-B	96-B	No. 10								
1952													
5-2	9220	1145	173			7573 73	FEDERAL TRADE COMMISSION DOCKET NO. 7129 EXHIBIT NO. 2300						6
5-15	9283	1145	227			7739 78	IN THE MATTER OF The Garden City						6
1955							DATE 9/24/58 WITNESS [Signature] ACE REPORTING CO., Official Reporter						
1-6	1906	1000	110			5860 80	By [Signature] (Wm. R. Rife - Greenville, S.C.)						
1-12	1931	1000	110			5755 25							
12-26	3631	1101	300			7168 23	Wm. Rife - Greenville, S.C.						
1957													
1-21	3573	1100	300			7162 50	Wm. Rife - Greenville, S.C.						
1-21	3574	1100	200			6876 00	Wm. Rife - Greenville, S.C.						
1-25	3631	1100	200			6876 00	Wm. Rife - Greenville, S.C.						
1-28	3632	1101	300			7168 23	Wm. Rife - Greenville, S.C.						4156
2-1	3670	1101	300			7168 23	Wm. Rife - Greenville, S.C.						37

COMMISSION'S EXHIBIT B No. 2200

DIXIE HOME STORES, INC.

**PREPAID
COLLECT**

GREENVILLE, SOUTH CAROLINA

BROKER BIDDLE

TERMS 2% 10 DAYS

LABELS

DIXIE HOME

~~NET 30 DAYS~~

ROUTING CMSTP&P-MONON-SOUTHERN

LESS 1/10TH OF 1% IN
LIEU OF NORMAL SWELLS

[illegible]

COMMISSION'S EXHIBIT F No. 2201-A

CUSTOMER	CENTRAL RETAILER-OWNED GROCERS, INC.	FREIGHT	PREPAID COLLECT	add Freight
----------	--------------------------------------	---------	--------------------	-------------

ADDRESS 155 NORTH WACKER DRIVE - CHICAGO, ILLINOIS.

BROKER	TERMS	NET 10 DAYS	LABELS	SHURFINE
---------------	--------------	--------------------	---------------	-----------------

ROUTING HOWARD'S CARTAGE

DATE 1956	INV. NO.	NUMBER OF CASES				GROSS BILLING	LABELS	FREIGHT	BROK.	DISCOUNT	RETURN & ALLOW.	DECLINE	PER CASE			
		TALL	as-B	96-B	No. 10								GROSS	NE		
6-27	2639	100				509 10	Associated Gro.							5 09		
7-17	2708	475	25			2481 38 19.00 03	United Grocers							5 09 2 50		
		4600	12			2000 12										
<div>FEDERAL TRADE COMMISSION DOCKET NO. 7129 IN THE MATTER OF THE DATE 9/24/58 WITNESS AGE REPORTING CO., OTHER REPORTING BY</div>																
															4158	39

COMMISSION'S EXHIBIT B No. 2201-A

FREIGHT**PREPAID
COLLECT**

4159

TERMS

LABELS

ROUTING

[illegible]

COMMISSION'S EXHIBIT F No. 2201-B

CUSTOMER

Central Retailer - Owned Grocers Inc.

FREIGHT

PREPAID
COLLECT

✓ - all 2 rt.

ADDRESS

155 North Wacker Drive, Chicago 6, Ill.

BROKER

TERMS

LABELS

Murphy

ROUTING

DATE	INV. NO.	NUMBER OF CASES				GROSS BILLING	LABELS	FREIGHT	BROK.	DISCOUNT	RETURN ALLOW.	DECLINE	PER C GROSS
		TALL	48-B	95-B	No. 10								
5-10	781	100				489 20	Associated Grocers						4
6-9	934	400	50			2052 30	United Grocers						4
7-11	1111	100				481 30	Associated Grocers						2
8-11			75			5105							
9-12	1302	400	75			2209 30	Associated Grocers						5
10-11	1522	100				511 15							5
11-7	1617	100	75			2231 17	United Grocers						5
11-27	1742	452				2333 22	United Grocers Corp. Assn.						5
1956													
1-3	1898	100				520 70	Associated Grocers						5
1-17	1952	425	75			2408 70	United Gro. Coop. Assn.						5
2-7	2044	100				517 50	Associated Grocers						5
2-8	2048	450				2328 75	United Grocers Corp. Assn.						5
4-11	2324	425	75			2355 05	United Grocers Corp. Assn.						5
5-11	2423	100				509 20	Associated Gro.						5
6-7	2551	400	100			2417 75	United Gro. Coop. Assn.						5

 FEDERAL
DOCKET NO. 7-12-57
MADE COMMISSION
EXHIBIT NO. 2201

4160

2201

785

COMMISSION'S EXHIBIT B No. 2201-B

CUSTOMER CENTRAL DIVISION - NATIONAL RETAILER-OWNED GROCERS, INC. FREIGHT

PREPAID
COLLECT

ADDRESS 308 WEST WASHINGTON STREET CHICAGO, ILLINOIS

BROKER C.D. NROG

TERMS 10 Days Net

LABELS SHURFINE

1916
0701

ROUTING

DATE	INV. NO.	NUMBER OF CASES				GROSS BILLING	LABELS	FREIGHT	BROK.	DISCOUNT	RETURN & ALLOW.	DECLINE	PER CASE	
		TALL	48-B	96-B	No. 10								GROSS	NET
5/14	1151	400			Associated Grocers Sault Ste. Marie, Mich.	1998 00	+ 414	Case Freight Charge					4 99 1/2	
5/2	1154				11/10 2nd 10% in freight of 70 normal									
5/3	1685	100			Hydrex Co. Inc. Madison, Wis.	471 50	✓						4 71 5	
5/7	1727	350	100		United Grocers Corp. Appleton, Wis.	1886 05							4 71 5	
5/7	1801	376	50		✓	1860 64							4 64	
5/15	1815	400			✓	2100	+ 1400	Freight Charge					4 64	
5/24	2204	350	10		✓	1887 20	+ 1440	Freight Charge					4 71 8	
5/24	2204	100			Hydrex Co. Inc. Madison, Wis.	479 80	+ 79 1/2	Freight Charge					4 71 8	
5/27	2495	400	50		United Grocers Corp. Appleton, Wis.	2063 38	+ 1400	Freight Charge					4 55	
5/31	2716	400	50		United Grocers Corp. Appleton, Wis.	2063 38	+ 1400	Freight Charge					4 55	
5/31														
5/31	2843	400			United Grocers Corp. Appleton, Wis.	2120 75	+ 1400	Freight Charge					4 99	
5/31	376	400	50		" " " "	2173 42	+ 1400	Freight Charge					5 09	
5/24	421	100			Hydrex Co. Inc. Madison, Wis.	503 00	+ 39 1/2	Freight Charge					5 02	
5/16	552	400	50		United Grocers Corp. Appleton, Wis.	2116 00	+ 1400	Freight Charge					4 98	
5/22	580	100			Associated Grocers Sault Ste. Marie, Mich.	1998 00	+ 1000	Freight Charge					4 98	

(42)

LIST OF EVAPORATED MILK CUSTOMERS
Through Topco Associates 1956
1956 Pack 49040 Cases 48/Tall Cans only(cases)

COMMISSION'S EXHIBIT No. 2202-A

NAME	DATE & INVOICE #	CASES LABEL	PRICE	AMOUNT	F.O.B.
American Community Stores 3-21 On. & James St. Omaha, Neb.	0716	800	(5.25) 4.90 + Frt..35	3920.00 280.00	Dest.
	4-13 07398	800	4.90 + Frt..35	3920.00 280.00	"
Big Bear Stores 770 Goodale Blvd. Columbus, Ohio	4-6 07326	300	5.25	1575.00	Dest.
Brockton Public Markets 157 Main St. Boston, Mass.	2-4 06931 4-9 07324	300 200	5.47 5.40 + stop-over 7.20	1647.70 1087.20	Dest. "
	8-8 00367	150	5.71	856.50	"
Harts Food Store, Inc. 175 Humboldt St. Rochester, N.Y.	2-1 06796 3-23 07216 4-2 07258 5-25 07673 6-10 04303 6-15 04361	1200 1200 1200 1200 1000 1000	5.42 5.30 5.28 5.28 5.15 5.15	6504.00 6360.00 6336.00 6336.00 5150.00 5150.00	Dest. " " " " " "
Kleins Super Market 1810 Como Ave. St. Paul, Minn.	1-26 06662 2-2 06808 4-16 07425 6-5 07854	425 600 500 500	5.05 5.05 4.90 5.22	2145.25 3030.00 2450.00 2610.00	Plant " " "
Liberal Markets, Inc. 230 Concord Ave. Dayton, Ohio	2-1 06797 5-28 07757	600 700	5.37 5.30	3222.00 3710.00	Dest. "
Meijers Whlse. Inc. 425 Fuller Ave., N.E. Grand Rapids, Mich.	2-22 06949 4-11 07328	400 400	5.00 5.10 + Stop-over charges	2000.00 2047.55	Plant "
Penn Fruit Co. P.O. Box 6122 Philadelphia, Penn.	2-29 07006 3-14 07150	1200 1200	5.46 5.46	6552.00 6552.00	Dest. "

SECRET NO. 7129
FEDERAL TRADE COMMISSION
IN THE MATTER OF
WITNESS
DATE 1-1-58
AGE REPORTING CO. Official Reporter

COMMISSION'S EXHIBIT No. 2202-B

Star Super Ave. Cleveland, Ohio	06790	200	5.37	1074.00	Dest.
	4-6				
	07325	400	5.25	2100.00	"
mb Super Ikt.	2-10				
	06828	500	5.05	2525.00	Dest.
	3-20				
	07142	700	5.08	3556.00	"
	4-11				
	07327	300	5.10 + stop-over charges	1537.55	"
	7-30				
	00305	700	5.40	3780.00	"
Star Market Co. 297 Walnut St. Newtonville, Mass	3-2				
	07048	700	5.557	3889.00	Dest.
	3-21				
	07203	300	5.436	1645.48	"
	5-23				
	07674	700	5.436	3805.20	"
	6-6				
	00365	700	5.71	3997.00	"
Supreme Mkts., Inc. 540 Gallivan Blvd. Dorchester, Mass.	2-14				
	06932	400	5.47	2194.70	Dest.
	3-16				
	07158	300	5.47	1647.70	"
	4-9				
	07323	320	5.40	1744.79	"
	8-8				
	00366	550	5.71	3240.50	"
TOTALS		23845		126,838.12	

FEDERAL TRADE COMMISSION
DOCKET NO. 7174-1
LIST OF EVAPORATED MILK CUSTOMERS
Through Topco Associates 1955
1955 Pack 25765 cases of 48/tall

COMMISSION
RECORDS EXHIBIT NO. 2202-C

NAME	DATE & INVOICE #	CASES 48/tall	PRICE	AMOUNT	F.O.B.
Bear Stores 770 W. Goodale A e. Columbus, Ohio	6-3 04228	1000	5.05	5050.00	Columbus
Kleins Super Market 1010 Cono St. Paul, Minn.	6-21 04404 4-28 03797	1000 500	5.05 5.30	5050.00 3100.00	" Dest.
Brockton Public Market, Inc. 157 Main St. Brockton, Mass.	7-12 04739	350	5.25	1837.50	Brockton
Liberal Market, Inc. Concord & Synder St. Dayton, Ohio	7-15 04752	700	5.15	3605.00	Juneau
Star Market Co. 297 Walnut St. Newtonville, Mass.	6-29 04523 7-12 04738 8-26 05255	575 350 775	5.25 5.25 5.25	3010.75 1837.50 4066.75	Dest. " "
Penn Fruit Co., Inc. Box 6122 Philadelphia, Penn.	5-27 04115	1500	5.25	7875.00	Dest.
Pick & Pay Mts., Inc. 2695 S. 40th. St. Cleveland	6-3 04227	400	5.15	2060.00	Dest.
TOTAL		7250		37,502.50	

COMMISSION'S EXHIBIT No. 2202-C

IN THE MATTER OF

808 LADY STREET
COLUMBIA, S. C.

DATE 12/9/58 WITNESS Barley
ACE REPORTING CO., Official Reporter

By 

Purchased from: THE BORDEN FOOD PRODUCTS COMPANY
DIVISION OF THE BORDEN COMPANY
350 MADISON AVE.
NEW YORK 17, N. Y.

[illegible]

735 cs. 48/tall	\$4,505.50
25 cs. 96/Small	152.50
	<u>\$4,658.00</u>

[illegible]

755 cs. 48/tall	\$4,812.75
35 cs. 96/small	221.25
	<u>\$5,034.00</u>

[illegible]

255 cs. 48/tall	\$1,683.00
5 cs. 96/small	33.00
	<u>\$1,716.00</u>

TELEPHONES
ALPINE 2-4144
ALPINE 2-5202

RAWL DISTRIBUTING COMPANY, Inc.
WHOLESALE GROCERIES
COLUMBIA 1, S. C.

1055 BERE A ROAD
P. O. BOX 9383

Purchases Borden's Evaporated Milk 1956 - 937 cases of Tall \$5725.00
29 cases of Small \$152.50
Purchases Borden's Evaporated Milk 1957 - 1110 cases of Tall \$7057.06
15 cases of Small \$96.25
Purchases Borden's Evaporated Milk through July 1958 -
185 cases of Tall \$1221.00
5 cases of Small \$33.00
Total volume sales for all products for year 1956 - \$1,147,573.95
Total purchases all products for year 1956 - \$1,060,495.58
Total volume sales for all products for year 1957 - \$1,164,307.38
Total purchases all products for year 1957 - \$1,084,657.81
Total volume sales through July for year 1958 - \$ 701,884.79
Total purchases all products through July 1958 - 627,452.01

COMMISSION'S EXHIBIT No. 2231

FEDERAL TRADE COMMISSION

DOCKET NO. 7129 ~~COMMON~~ EXHIBIT NO. 2231

IN THE MATTER OF *The Borden Company*

DATE *12/9/58* WITNESS *Buckman*
ACE REPORTING CO., Official Reporter

By *Alc*

1-2231
4202
47

SHUMPERT'S FOOD CITY

1205 "C" AVENUE

WEST COLUMBIA, S. C.

NOVEMBER 15, 1958 FEDERAL TRADE COMMISSION
DOCKET NO. 7/29 COMMISSION EXHIBIT NO. 2232

IN THE MATTER OF *Sh W. Corden Co.*
DATE *12/9/58* WITNESS *Shumpert*
ACE REPORTING CO., Official Reporter

FEDERAL TRADE COMMISSION,
BUREAU OF LITIGATION,
WASHINGTON 25, D.C.

By *alc*

ATT: M.R. DANIEL T. COUGHLIN,

DEAR M.R. COUGHLIN,

PURSUANT TO YOUR RECENT REQUEST WHILE IN COLUMBIA WE SUBMIT THE FOLLOWING INFORMATION RELATIVE TO YOUR INQUIRY:

PURCHASES:		SALES:
YEAR 1955	\$ 1120834.34	\$ 1257283.18
" 1957	1115224.13	1257302.57
THRU NOVEMBER 1958.	1091290.35	1250408.49
2. ORIGINAL PURCHASES OF MISS VIRGINIA MILK WERE MADE IN JUNE 1958		
AT A PRICE OF \$ 5.85 LESS 15¢ PER CASE. \$ 5.70 L.E.T		
PRICE FROM AUG 4, 1958 TO DATE. . \$ 5.97 LESS 15¢ PER CASE. 5.82		

WE TRUST THE ABOVE INFORMATION WILL BE SUFFICIENTLY COMPLETE TO BE BENEFICIAL IN YOUR CASE.

WITH BEST WISHES, WE ARE,

YOURS TRULY,

SHUMPERTS FOOD CITY

Daniel J. Shumpert

DANIEL J. SHUMPERT

22 4203

48

Associated Grocers

*Retailer - Official
Wholesale Grocers*

320 S. HUDSON STREET . . . P. O. BOX 2302

GREENVILLE, SOUTH CAROLINA

November 14, 1958

Mr. Daniel T. Coughlin
Bureau of Litigation
Federal Trade Commission
Washington 25, D. C.

FEDERAL TRADE COMMISSION

DOCKET NO. 7129 COMMISSION EXHIBIT NO. 2234

IN THE MATTER OF *The Borden Company*

DATE *12/10/58* WITNESS *N. Ponder*
ACE REPORTING CO., Official Reporter

By *ac*

Dear Mr. Coughlin:

Listed below is the information you requested regarding our organization.

Total sales:

For fiscal year ending June 1956	\$2,077,274.38
For fiscal year ending June 1957	\$2,457,299.51
For fiscal year ending June 1958	\$3,092,222.05

Total purchases:

For fiscal year ending June 1956	\$2,137,407.35
For fiscal year ending June 1957	\$2,539,479.72
For fiscal year ending June 1958	\$3,194,107.36

Total purchases of Borden's Silver Cow Evap. Milk:

For fiscal year ending June 1956	3,894 cs. tall	495 cs. small
For fiscal year ending June 1957	3,835 cs. tall	490 cs. small
For fiscal year ending June 1958	4,065 cs. tall	480 cs. small

If we can be of further help to you please let us know.

Yours very truly,

ASSOCIATED GROCERS, INC. of S. C.

Neal P. Ponder
Neal P. Ponder

Information requested
by the Federal Trade Commission

1. Dollar dollar volume of purchases,
for all products, for each of
the years 1956-1958.

1956- 674,240.76 1957 1,219,559.36 1958 1,348,231.35

2. Name information as above
with regard to sales.

1956 1,095,210.09 1957 1,455,160.40 1958 1,366,380.80

3. Total purchases of Garden brand,
evaporated milk (Diners brand),
giving date and small separately,
for each of the years 1956-1958.

1957 2684 cs. 1958 2920 cs. thru Oct.

DANIEL T. LOUGHAN
BUREAU OF LITIGATION,
FEDERAL TRADE COMMISSION,
WASHINGTON 25, D.C.

FEDERAL TRADE COMMISSION

DOCKET NO. 7129 COMMISSION EXHIBIT NO. 2235

IN THE MATTER OF THE GARDEN COMPANY

DATE 12/10/58 WITNESS
ACE REPORTING CO., Official Reporter

By *ALC*

2235

50 4205

✓
OFFICE AND WAREHOUSE
209 DEPOT STREET

ESTABLISHED 1920

R. P. TURNER COMPANY

TELEPHONES
TR 7-3371 AND TR 7-3372

Wholesale Grocers

GREER, SOUTH CAROLINA

December 10, 1958

BORDEN EVAPORATED MILK PURCHASES

<u>YEAR</u>	<u>Cases Small</u>	<u>Cases Tall</u>	<u>Dollar Value</u>
1956	810	5,184	\$37,084.70
1957	708	5,365	39,166.57
1958	564	4,695	34,720.26

FEDERAL TRADE COMMISSION

EXHIBIT 12, 7/29
IN THE MATTER OF *W. S. Sargent Company*
DATE *12/10/58* BY *Mc. Kelly*
ACE REPORTING CO., (Official Reporter)

By *Alc*

November 18, 1958

FEDERAL TRADE COMMISSION
DOCKET NO. 7129 COMMISSION EXHIBIT NO. 2238
IN THE MATTER OF J.W. Borden Company
DATE 12/11/58 WITNESS J.W. Borden
ACE REPORTING CO., Official Reporter
By aw

Daniel T. Coughlin
Bureau of Litigation
Federal Trade Commission
Washington 25, D.C.

Dear Mr. Coughlin,

We are very happy to cooperate with your office by submitting the following information which you requested during your recent visit.

However, you will note the report for 1958 does not cover a complete year as we end our year on March 31st.

TOTAL DOLLAR PURCHASES, ALL PRODUCTS

	1956	1957	1958
	\$9,159.498.04	\$10,461.930.10	\$5,679.221.80

TOTAL DOLLAR SALES, ALL PRODUCTS

	1956	1957	1958
	9,453.460.15	10,795.725.74	5,949.221.80

TOTAL PURCHASES DOLLAR VOLUME AND CASE QUANTITY BORDEN EVAPORATED MILK.

TALL	5100	\$32,932.50
Baby	535	3,896.25

Tall	7800	51,480.00
Baby	900	5,940.00

Tall	3375cs	23,595.00
Baby	335	2,210.00

Yours very truly,

ASSOCIATED GROCERS MUTUAL OF
CAROLINAS, INC.

Clyde E. Todd
Clyde E. Todd, Mgr.

4215

52

L. W. PETRIE, INC.
WHOLESALE GROCERS
CHARLOTTE 2, N. C.

November 19, 1958

FEDERAL TRADE COMMISSION

DOCKET NO. 7129 COMMISSION EXHIBIT NO. 2239
IN THE MATTER OF *Borden Company*
DATE *12/11/58* WITNESS *Petrie*
ACE REPORTING CO., Official Reporter
By *AW*

Mr. Daniel T. Coughlin
Bureau of Litigation
Federal Trade Commission
Washington 25, D. C.

Dear Mr. Coughlin:

The information you asked me to work up for you

is as follows: Borden Food Products Company-Silver Cow Milk

Year	\$ Value -All	\$ Value -Small	# Cases -All	# Cases -Small
1956	\$2,376.75	\$30.25	385	5
1957	2,689.05	166.80	422	26
1958 thru 7-27-53 11-10-58	(2,904.00) (993.00)	66.00	(43) (150)	17

Purchases and sales of all products	
1956 purchases	\$762,062.09
1956 sales	\$833,003.65
1957 purchases	721,995.05
1957 sales	792,063.27
1958 thru 10-31-58 purchases	571,386.49
1958 thru 10-31-58 sales	616,831.00

Yours truly,
Mrs. L. W. Petrie
L. W. Petrie, Inc.
by Mrs. A. L. Howell

SALES DEPARTMENT

FORM A 110-A
REV. 1-1954

DATE SHIPPED **11/18/57**

CUSTOMER'S ORDER NO. OUR ORDER NO. **20480**

SALES REPRESENTATIVE **DELK & WHITE BRKCE CO**
NORFOLK VA 2407

CAR NO. **LV 62173**

COLONIAL STORES INC
301 DUNMORE STREET
NORFOLK VIRGINIA

15076

SPECIAL INSTRUCTIONS

GENERAL SHEET 1-21

TERMS
CASH IN 15 DAYS LESS 1%
FOR 30 DAYS NET 2%
DISTANCE TO 44 MILES
380 MADISON AVE. NEW YORK
17-N. Y. IN POUNDS PAYABLE
AT PAR 100% IN 15 DAYS

SHIP TO ADDRESS

ROUTE

SIZE, PACK AND BRAND

STOCK NO.

PRICE

TRADE DISCOUNT

AMOUNT

1200

BORDEN'S TALL COMMISSION

2861

6.15

EVAP MILK SUBJECT TO 1/10 OF 1% SELL ALLOWANCE

7740.00

773.26

4816

THANK YOU

THE BORDEN FOOD PRODUCTS COMPANY
DIVISION OF THE BORDEN COMPANY

FACTORY INVOICE

Place special service destination

712-SEABOARD AIR LINE RAILROAD COMPANY-712
PREPAID FREIGHT BILL-ORIGINAL

Form 257-A
100M 1-57

Freight Bill No.
Freight Bill Date

STOP THIS CAR AT **6 02173** **Worfolk, VA**

WEIGHT IN TONS	LENGTH OF CAR	MARKED CAPACITY OF CAR
Ordered	Ordered	Ordered
Furnished	Furnished	Furnished

DATE **November 11, 1957** STATION **Worfolk, VA** STATE **VA**

ROUTE: Show each location and carrier in route order to destination of waybill. Show Agent's name and address in Shipper's Office.

Reconsignee to **Sharon G. Robinson, Care 040** STATION **Worfolk, VA** STATE **VA**

ORIGIN AND DATE: ORIGINAL CAR, TRANSFER FREIGHT BILL AND PREVIOUS WAYBILL, REFERENCE AND ROUTING WHEN REBILLED.

Authority: **Colonial Storage, Inc.**
201 Commonwealth

FINAL DESTINATION AND ADDITIONAL ROUTING
Worfolk, VA

WHEN SHIPPER IN THE UNITED STATES EXECUTES THE NO-RECOURSE CLAUSE OF SECTION 7 OF THE BILL OF LADING, INSERT "YES".
Indicate by number and call letters provided in this weight were obtained for L.C.L. shipments only. R-Railroad Rate, S-Shipper's or shipper's agent's weight, C-Carrier's weight, etc.
OR C.L. TRAFFIC-INSURANCE (Recording, Packing, Ventilation, Heating, Milling, Weighing, Etc. If Lead, Specify to Whom Being Shipped)

AMOUNT	WEIGHT
C. 0.00	AV. Weight Agreement
D. 0.00	GROSS
	TARE
	ALLOWANCE
	NET
	IF CHARGES ARE TO BE PREPAID, WRITE OR STAMP HERE "TO BE PREPAID"

No. Pick. & Description of Articles, Special Marks and Exceptions
1206 Borden's Silver Gen

Shippers Lot and original
Business
SHEET NO. **108**
LINE NO. **3**
DATE AND **11-20-57**
APPROVED **[Signature]**
ACCOUNT NO. **60-11**
Seaboard Air Line R.R. Co.
Chester, S.C.

WEIGHT	FREIGHT	ADVANCES	PREPAID
11.800	247.80		247.80
	F.T. Tax		7.48
			254.68

SALES DEPARTMENT

RD 1/31/58
FROM ERLAND PENNA
WELLS

CUSTOMER'S ORDER NO. OUR ORDER NO.
B 20875 426

SALES REPRESENTATIVE
PEER BKCE CO
GREENSBORO N C 827

DATE SHIPPED
2/25/58

THE KROGER CO
P O BOX 1751
ROANOKE, VA

FEDERAL TRADE COMMISSION
EXHIBIT 10490
BUCKET NO 2121

SPECIAL INSTRUCTIONS

IN THE MATTER OF Borden's Milk
DATE 2/25/58 BY [signature]
Be. [signature]

THE KROGER CO
GREENSBORO, N C

CAR NO - BDX 1173

POOL CAR SHIPMENT

CASES	SIZE	PACK AND BRAND	STOCK NO.	PRICE	TRADE DISCOUNT	AMOUNT
200	BORDENS TALL		0522	6 60		1320 00
50	BORDENS SMALL	4 00Z	0552	3 30		165 00
						1485 00
						1 49
						1483 51
						2 25
						1485 76

EVAP MILK SUBJECT
TO 1/10 OF 1%
SMELL ALLOWANCE

S/O CHCE

THANK YOU

THE BORDEN FOOD PRODUCTS COMPANY
DIVISION OF THE BORDEN COMPANY

6/4/69

56

57.

THE BORDEN FOOD PRODUCTS COMPANY
DIVISION OF THE BORDEN COMPANY

SALES DEPARTMENT

FORM 1110 (Rev. 1-15-57)

SHIPPED TO: 11/12/57
FROM: DIXON ILL.

CUSTOMER'S ORDER NO. OUR ORDER NO.
N 53155 10306

SALES REPRESENTATIVE
DELA & MILITARY CO
NORFOLK VA 107

DATE SHIPPED
11/28/57

OUR NO. 11-16551

SOLE TO

COLONIAL STORES INC
301 CUMMINS ST
NORFOLK VA

ADDRESS

500

SPECIAL INSTRUCTIONS
SHIP

SHIPPED TO
ADDRESS

NAME

GENERAL SHIP NO.

TERMS
(CASH IN 10 DAYS, CREDIT
OR 30 DAYS NET
STANDARD PAYMENT
17% ADVANCE PAYABLE
AT 10% ADVANCE)

ROUTE 162 CLEARING (60)

RATE 1.00

QTY	DESCRIPTION	PRICE	STOCK NO.	TRADE DISCOUNT	AMOUNT
800	BORDENS TALL	6.12	0322	10%	5160.00
	THANK YOU				
					5160.00

FACTORY INVOICE

THE BORDEN FOOD PRODUCTS COMPANY
DIVISION OF THE BORDEN COMPANY

1000-16-1-1000

1000-16-1-1000

ILLINOIS CENTRAL RAILROAD COMPANY

PREPAID FREIGHT BILL

CAR INITIALS AND NUMBER: **RC 16037** STATION: **Q3** DATE: **NOV 20 1957** FREIGHT BILL NO.: **229076** WAYBILL NO.: **229076**

ROUTE: **MEMPHIS - DUNMORE VA** SHIPPER: **THE BORDEN CO** STATE: **VA**

CLEARING CO

CONSIGNEE AND ADDRESS:
COLONIAL STORES INC
301 DUNMORE ST

For Charges on articles to be transported

WEIGHTED
GROSS: **7129**
TARE: **1151**
ALLOWANCE:
NET:

INSTRUCTIONS (Receiving, Loading, Ventilation, Handling, Milling, Weighing, etc. - If load is to be stored, it should be charged.)

KEEP VENTS CLOSED & PLUGS INTODEST

No. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	WEIGHT	DATE	FREIGHT	ADVANCES	PREPAID
800	CASES OF EVAP MILK IN CANS 57/5 SL2C	41200	100	412.00		412.00
<p>THANK YOU</p> <p>RECEIVED PAYMENT FOR THE COMPANY NOV 22 1957</p>						
TOTAL				412.00		412.00

SALES DEPARTMENT CUSTOMER'S ORDER NO. 5803 OUR ORDER NO. 2196 INVOICE DATE March 1959		SEE SPECIAL NOTICE ON BACK OF THIS INVOICE	
SALES REPRESENTATIVE Mr. J. B. [unclear] 6601 L. STONE 101 DUBOIS ST. PORTLAND, ME		SPECIAL INSTRUCTIONS Shipped 2/27 to 5017	
SHIPPED FROM DEPT. 11 DATE APRIL 15, 1959 BY Mr. J. B. [unclear]		TERMS CASH IN 10 DAYS - 2.5% DISCOUNT PAYMENT TO BE MADE TO MADISON AVENUE NEW YORK 17 N.Y. IN FUNDS PAYABLE AT PAR	
CASES 1200 SIZE, PACK AND BRAND 1200		STOCK NO. 6522 PRICE 6.60 AMOUNT 7184	
THE BORDEN FOOD PRODUCTS COMPANY DIVISION OF THE BORDEN COMPANY		FOR THE MATTER OF BORDEN COMPANY DATE APRIL 15, 1959 WITNESS ACE REPORTING CO., Official Reporter By ALC	

DOM-104B-CFO

Form 107a W. E. Rm.

ILLINOIS CENTRAL RAILROAD COMPANY

IC 50173

R PREPAID FREIGHT BILL

FREIGHT BILL NO.

CAR INITIALS AND NUMBER

DATE DEC 28 1957

WAYBILL NO. 229292

FROM STATION STATE

TO STATION STATE

ROUTE

SHIPPER

NORFOLK VA

2090 DIXON ILLINOIS

CLEARING CO

THE BORDEN CO

For Charges on articles to be transported

CONSIGNEE AND ADDRESS

WEIGHED

COLONIAL STORES

TARE 111B 151

INSTRUCTIONS (Regarding Tare, Ventilation, Heating, Milling, Weighing, Etc., If local, specify to whom Tare should be charged)

KEEP VENTS CLOSED AND PLUGS IN TO DESTN

RECEIVED
 SECRET NO. 111
 IN THE MATTER OF *Borden Company*
 DATE *April 15 1958* WITNESS
for reporting to, Office Agent
By the

No. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
1200 CS TALL 8 C 48 S	CASES OB EVAP MILK IN CANS	61800	88	543 84		543 84
	SHIPPERS LOAD & COUNT					
	FOR STORAGE IN TRANSIT					

51 1/2

THANK YOU
 I-C-R-R
 RECEIVED PAYMENT FOR THE COMPANY
 DEC 21 1958
 AGENT



TOTAL	543 84
FEDERAL TAX	16 32
AMOUNT TO COLLECT	560 16

SHIPPED FROM DIXON ILL. PH 1/28/57 VIA 1/28/57		SALES DEPARTMENT CUSTOMER'S ORDER NO. OUR ORDER NO. 129		DATE SHIPPED 1/30/57	
FIRST NATIONAL STORES 217 READ ST. PORTLAND MAINE		SALES REPRESENTATIVE H.P. ROSS CO. BIDDEFORD MAINE 1206		GENERAL OFFICE SHEET NO.	
FIRST NATIONAL STORES DEERING JUNCTION MAINE		CAR NO.		TERMS CASH IN 10 DAYS, NET 30 ON 10 DAYS, NET 30 350 MADISON AVENUE NEW YORK 176 N. 17th ST. PHOENIX ARIZONA	
POOL CAR SHIPMENT		STOCK NO.		AMOUNT	
BORDENS YALL		0522		1236 30	
FEDERAL TRADING COMMISSION PO BOX NO. 1129 WASHINGTON, D.C.		PRICE		TRADE DISCOUNT	
THANK YOU		DATE		1237 81	
FACTORY INVOICE		DATE		1237 81	

SALES DEPARTMENT		DATE SHIPPED 1/30/51	
CUSTOMER'S ORDER NO. OUR ORDER NO. 129		SALES REPRESENTATIVE W P ROSS CO BIDDEFORD MAINE 286	
GREAT ATLANTIC & PACIFIC TEA CO 93 KENNEBEC ST PORTLAND MAINE		SPEC SHIP CAR NO 4472	
SHIPPED TO ADDRESS 93 KENNEBEC ST PORTLAND MAINE		GENERAL SHEET NO OFFICE	
ROUTE 300 75		TERMS CASH IN 15 DAYS, LESS 2% IF PAID ON 10 DAYS NET 10% IF PAID ON 5 DAYS NET 15% IF PAID ON 30 DAYS NET 15% IF PAID ON 60 DAYS NET 15% IF PAID ON 90 DAYS NET 15% IF PAID ON 120 DAYS NET 15% IF PAID ON 150 DAYS NET 15% IF PAID ON 180 DAYS NET 15% IF PAID ON 210 DAYS NET 15% IF PAID ON 240 DAYS NET 15% IF PAID ON 270 DAYS NET 15% IF PAID ON 300 DAYS NET 15%	
CASES BORDENS TALL BORDENS SMALL		SIZE, PACK AND BRAND 1 DOZ	
STOCK NO. 0522 0552		PRICE 6.39 3.15	
THANK YOU		TRADE DISCOUNT 10% 10% 10%	
AMOUNT 1899.00 1236.25 2126.25		AMOUNT 2124.18 2127.50 2127.50	
THE BORDEN FOOD PRODUCTS COMPANY DIVISION OF THE BORDEN COMPANY		13	

COMMISSION'S EXHIBIT No. 5296

STIPULATION

United States of America
Before Federal Trade Commission

In the Matter of
THE BORDEN COMPANY,
a corporation

Docket 7129

Counsel supporting the complaint herein and counsel for respondent hereby stipulate as follows for all purposes of this proceeding:

Handlers of private label evaporated milk

1. The following persons, firms or corporations were wholesale grocery concerns:

Abingdon Grocery Co., Inc., Abingdon, Va.
American Wholesale Grocery Co., Seattle, Wash.
Blue Ridge Grocery Co., Waynesboro, Va.
Miles Bradford Co., Bradford, Pa.
Capitol Supply Co., Baton Rouge, La.
Cash Grocery & Sales Co., Alexandria, La.
Charley Bros. Co., South Greensburg, Pa.
The Commission Co., Seattle, Wash.
Consolidated Co., Inc., New Orleans, La.
Continental Foods, Yakima, Wash.
Cumberland Grocery Co., La Follette, Tenn.

Danville Wholesale Co., Danville, Pa.
Elliot Grocery Co., Bessemer, Ala.
Frank Wholesale Co., Shreveport, La.
Hazleton Wholesale Grocery Co., Hazleton, Pa.
Henderson Grocery Co., Henderson, N. C.
J. L. Henderson Co., San Francisco, Cal.
Hudson House Inc., Albany, Ore.
Hudson House Inc., Bend, Ore.
Hudson House Inc., Longview, Wash.
Hudson House Inc., McMinnville, Ore.
Hudson House Inc., Portland, Ore.
Hudson House Inc., Roseburg, Ore.
Hudson House Inc., The Dalles, Ore.
Kimbell-Abilene Co., Abilene, Tex.
Kimbell-Albuquerque Co., Albuquerque, N. M.
Kimbell-Amarillo Co., Amarillo, Tex.
Kimbell-Austin Co., Austin, Tex.
Kimbell-Brady Co., Brady, Tex.
Kimbell-Brownwood Co., Brownwood, Tex.
Kimbell-Camden Co., Camden, Ark.
Kimbell-Childress Co., Childress, Tex.
Kimbell-Clovis Co., Clovis, N. M.
Kimbell-Corpus Christi Co., Corpus Christi, Tex.
Kimbell-Grocery Co., Ft. Worth, Tex.
Kimbell-Hobbs Co., Hobbs, N. M.
Kimbell-Hot Springs Co., Hot Springs, Ark.
Kimbell-Las Vegas Co., Las Vegas, N. M.
Kimbell-Little Rock Co., Little Rock, Ark.
Kimbell-Lubbock Co., Lubbock, Tex.
Kimbell-Lufkin Co., Lufkin, Tex.
Kimbell-Mayfield Co., Tyler, Tex.
Kimbell-Midland Co., Midland, Tex.
Kimbell-Paris Co., Paris, Tex.

Kimbell-Pecos Co., Pecos, Tex.
 Kimbell-Pittsburg Co., Pittsburg, Tex.
 Kimbell-Plainview Co., Plainview, Tex.
 Kimbell-Roswell Co., Roswell, N. M.
 Kimbell-San Angelo Co., San Angelo, Tex.
 Kimbell-San Antonio Co., San Antonio, Tex.
 Kimbell-San Benito Co., San Benito, Tex.
 Kimbell-Santa Fe Co., Santa Fe, N. M.
 Kimbell-Sherman Co., Sherman, Tex.
 Kimbell-Stamford Co., Stamford, Tex.
 Kimbell-Sweetwater Co., Sweetwater, Tex.
 Kimbell-Texarkana Co., Texarkana, Tex.
 Kimbell-Uvalde Co., Uvalde, Tex.
 Kimbell-Waco Co., Waco, Tex.
 Kimbell-Wichita Falls Co., Wichita Falls, Tex.
 Kockos Bros., San Francisco, Cal.
 Lafferty-Pioneer, Inc., Eugene, Ore.
 Northwest Grocery Co., Ashland, Ore.
 Northwest Grocery Co., Portland, Ore.
 Perloff Bros., Inc., Philadelphia, Pa.
 Perloff Bros., Inc., Shenandoah, Pa.
 Pioneer Grocery Co., Coos Bay, Ore.
 Pioneer Grocery Co., Eugene, Ore.
 Harry M. Pollock Co., Inc., Kittanning, Pa.
 Progressive Warehouse, Lafayette, La.
 Radford Big Spring Co., Big Spring, Tex.
 Roundup Grocery Co., Spokane, Wash.
 Morris Sewall & Co., Inc., Houston, Tex.
 Morris Siegal Co., Wilkes-Barre, Pa.
 Springfield Sugar & Jroduce Co., Springfield, Mass.
 Thomas & Howard Co., Allendale, S. C.
 Thomas & Howard Co., Charleston, S. C.
 Thomas & Howard Co., Charlotte, N. C.

Thomas & Howard Co., Chester, S. C.
 Thomas & Howard Co., Columbia, S. C.
 Thomas & Howard Co., Darlington, S. C.
 Thomas & Howard Co., Durham, N. C.
 Thomas & Howard Co., Greensboro, N. C.
 Thomas & Howard Co., Hickory, N. C.
 Thomas & Howard Co., Orlando, Fla.
 Thomas & Howard Co., Salisbury, N. C.
 Thomas & Howard Co., Spartanburg, S. C.
 Thomas & Howard Co., Washington, D. C.
 Timberlake Grocery Co., Albany, Ga.
 Timberlake Grocery Co., Macon, Ga.
 Timberlake Grocery Co., Thomasville, Ga.
 United Cash Grocery Co., Gulfport, Miss.
 Virginia Foods, Bluefield, Va.
 Virginia Foods, Salem, Va.
 Wadham's & Co., Portland, Ore.
 Willamette Grocery Co., Salem, Ore.
 Yakima Grocery Co., Yakima, Wash.

2. The following persons, firms or corporations (a) were wholesale grocery concerns and also (b) either (i) operated some retail outlets or (ii) sold or otherwise transferred goods to parent, subsidiary or otherwise affiliated companies which operated retail outlets:

American Community Stores, Omaha, Neb.
 Daylight Grocery Co., Jacksonville, Fla.
 W. H. Dunne Co., Norwich, N. Y.
 Lucky Wholesale Foods, Redding, Cal.
 McCarthy-Holman Co., Jackson, Miss.
 Schultz Bros., Sheboygan, Wis.
 Yantic Grain Products Co., Norwich, Conn.

3. The following persons, firms or corporations (i) were retail grocery concerns or (ii) sold or otherwise transferred goods to parent, subsidiary or otherwise affiliated companies which were retail grocery concerns:

Albers Division Warehouse, Cincinnati, Ohio
 Bettencourt's, San Jose, Cal.
 Big Bear Stores, Co., Columbus, Ohio.
 Brockton Public Markets, Brockton, Mass.
 Colonial Stores, Inc., Atlanta, Ga.
 Colonial Stores, Whse, Cincinnati, Ohio
 Colonial Stores, Inc., Columbia, S. C.
 Colonial Stores, Inc., Columbus, Ohio
 Colonial Stores, Inc., East Point, Ga.
 Colonial Stores, Inc., Norfolk, Va.
 Colonial Stores, Inc., Raleigh, N. C.
 Colonial Stores, Inc., Thomasville, Ga.
 Community Cash Stores, Spartanburg, S. C.
 Eagle United, Inc., Milan, Ill.
 Eagle United, Inc., Rock Island, Ill.
 El Paso Wholesale Co., El Paso, Tex.
 Food Center, Memphis, Tenn.
 Food Fair Stores, Inc., Philadelphia, Pa.
 Furrs Food Stores, Amarillo, Tex.
 Furrs, Inc., El Paso, Tex.
 Furrs, Inc., Lubbock, Tex.
 Golub Corp., Green Island, N. Y.
 Hanford Milk Co., Amarillo, Tex.
 Hanford Milk Co., Ashley, Tex.
 Hanford Milk Co., Benning, D. C.
 Hanford Milk Co., Dallas, Tex.
 Hanford Milk Co., El Paso, Tex.
 Hanford Milk Co., Houston, Tex.

- Hanford Milk Co., Kansas City, Kan.
 Hanford Milk Co., Kearny, N. J.
 Hanford Milk Co., Little Rock, Ark.
 Hanford Milk Co., Oklahoma City, Okla.
 Hanford Milk Co., Omaha, Neb.
 Hanford Milk Co., Portland, Ore.
 Hanford Milk Co., Tulsa, Okla.
 Hanford Milk Co., Wichita, Kan.
 Harts Food Stores, Inc., Rochester, N. Y.
 Hill Grocery Co., Birmingham, Ala.
 Humpty-Dumpty Super Marts, Oklahoma City,
 Okla.
 Klein Super Markets, Inc., St. Paul, Minn.
 Meijers Wholesale, Inc., Grand Rapids, Mich.
 Fred Meyer Inc., Portland, Ore.
 Milgram Food Stores, Kansas City, Mo.
 National Food Stores, New Orleans, La.
 Oneida Markets, Inc., Albany, N. Y.
 Penn Fruit Co., Philadelphia, Pa.
 Pick-n-Pay Super Markets, Inc., Cleveland, Ohio
 Pick-n-Pay Super Markets, Inc., Maple Heights,
 Ohio
 Plumbs Super Markets, Inc., Muskegon, Mich.
 Red Food Stores, Chattanooga, Tenn.
 George C. Shaw Co., Portland, Me.
 Siri's San Francisco, Cal.
 Star Markets Co., Watertown, Mass.
 Supreme Markets, Inc., Dorchester, Mass.
 Supreme Markets, Inc., So. Boston, Mass.
 Tradewell Stores, Inc., Seattle, Wash.
 J. Weingarten, Inc., Houston, Tex.
 J. Weingarten, Inc., Memphis, Tenn.
 Winn Dixie Hill Inc., Harahan, La.

Winn Dixie Hill Inc., New Orleans, La.
 Winn Dixie Montgomery, Inc., Montgomery, Ala.
 Winn-Dixie Stores, Greenville, S. C.
 Winn-Dixie Stores, Jacksonville, Fla.
 Winn-Dixie Stores, Louisville, Ky.
 Winn-Dixie Stores, Miami, Fla.
 Winn-Dixie Stores, Tampa, Fla.
 Winn Dixie Stores, Inc., Raleigh, N. C.

4. The Nestle Company, of Glendale, New York, and Portland, Oregon, was a grocery manufacturing concern.

5. Piggly-Wiggly Carolina Co., of Charleston and Columbia, S. C., was a cooperative buying association which sold at wholesale to its retailer members.

Handlers of Borden Brand evaporated milk

6. The following persons, firms or corporations were wholesale grocery concerns:

Abingdon Grocery Co., Abingdon, Va.
 American Wholesale Grocery, Seattle, Wash.
 R. G. Amezcua & Co., El Paso, Tex.
 Berger-Kleifgen Co., Rochester, N. Y.
 Berkeley Feed Corp., Norfolk, Va.
 Black Diamond Wholesale Grocery Co., Wilkes-Barre, Pa.
 Blessing Waterhouse Co., Chattanooga, Tenn.
 Blue Ridge Grocery Co., Waynesboro, Va.
 Buckeye Feed & Grain Co., Birmingham, Ala.
 F. Cappelino & Sons, Rochester, N. Y.
 Central Wholesale Grocery Co., Wilkes-Barre, Pa.

Clark & Lewis Co., Jacksonville, Fla.
Cohen & Baltrus, Wilkes-Barre, Pa.
Consolidated Companies, Inc., New Orleans, La.
Consolidated Companies, Inc., New Orleans, La.
Conco Wholesale Acct.
J. C. Curry & Co., Bessemer, Ala.
Daneri Bros., San Francisco, Cal.
A. A. Dela Torre & Sons, El Paso, Tex.
George Dunson, New Orleans, La.
Economical Wholesale, Klotzville, La.
Economy Cash & Carry Wholesale, El Paso, Tex.
Elliott Grocery Co., Bessemer, Ala.
Erwin Wholesale Co., Spartanburg, S. C.
S. M. Flickinger Co. Inc., Rochester, N. Y.
Food Center Wholesale Grocery Co., Cambridge,
Mass.
J. S. Fraering, New Orleans, La.
M. A. Gomez, El Paso, Tex.
Grocers Supply Co., Houston, Tex.
Grocers Wholesale Co., San Francisco, Cal.
Hudson House, Inc., Bend, Ore.
Hudson House, Inc., Longview, Wash.
Hudson House, Inc., Portland, Ore.
Hudson House, Inc., Roseburg, Ore.
Hudson House, Inc., The Dalles, Ore.
Kimbell-Albuquerque Co., Albuquerque, N. M.
Kimbell-Roswell Co., Roswell, N. M.
Kimbell-Santa Fe Co., Santa Fe, N. M.
Kockos Bros., San Francisco, Cal.
Lafferty-Pioneer Corp., Eugene, Ore.
Pioneer Grocery Co., Eugene, Ore.
R. E. Lafferty & Sons, Eugene, Ore.
Arthur Lazarus, Wilkes-Barre, Pa.

Levy Grocery Co., Baton Rouge, La.
 Liberty Cash Grocers, Memphis, Tenn.
 Louisiana Specialty Co., Baton Rouge, La.
 Malone & Hyde Inc., Memphis, Tenn.
 P. A. Menard, Inc., New Orleans, La.
 Merchants Distributors, Inc., Hickory, N. C.
 Merchants Grocery Co., Lafayette, La.
 Mosteller Grocery Co., Hickory, N. C.
 National Brands, Inc., Miami, Fla.
 Northwest Grocery Co., Milwaukie, Ore.
 Northwest Grocery Co., Portland, Ore.
 Perloff Bros., Inc., Philadelphia, Pa.
 Pillans & Smith Co., Ocala, Fla.
 Harry M. Pollock Co., Inc., Kittanning, Pa.
 Harvey Ragland, Birmingham, Ala.
 Rawl's Distributing Co., Columbia, S. C.
 Morris Sewall & Co., Inc., Houston, Tex.
 Morris Siegel, Wilkes-Barre, Pa.
 L. T. Snow & Co., San Francisco, Cal.
 Sam Spina Importing Co., Birmingham, Ala.
 Springfield Sugar & Produce Co., Springfield,
 Mass.
 Standard Grocery Co., Boston, Mass.
 Thomas & Howard, Allendale, S. C.
 Thomas & Howard Co., Charlotte, N. C.
 Thomas & Howard Co., Columbia, S. C.
 Thomas & Howard Co., Darlington, S. C.
 Thomas & Howard Co., Hickory, N. C.
 Thomas & Howard Co., Salisbury, N. C.
 Thomas & Howard Co., Spartanburg, S. C.
 Thomas & Howard Co., Washington, N. C.
 Timberlake Grocery Co., Thomasville, Ga.
 V. Traverso Co., San Francisco, Cal.

Tri-State Wholesale Assoc. Grocers, Inc., Ashley,
Tex.

Tri-State Wholesale Assoc. Grocers, Inc., El Paso,
Tex.

United Cash Grocery, New Orleans, La.

Virginia Foods, Inc., Salem, Va.

Wadham's & Co., Portland, Ore.

Willamette Grocery Co., Salem, Ore.

Williams Bros., Wilkes-Barre, Pa.

Wood-Fruitticher, Birmingham, Ala.

7. The following persons, firms or corporations
 (a) were wholesale grocery concerns and also
 (b) either (i) operated some retail outlets or (ii)
 sold or otherwise transferred goods to parent, subsidiary
 or otherwise affiliated companies which operated retail
 outlets:

The Alterman Brothers, Atlanta, Ga.

American Community Stores, Omaha, Neb.

Daylight Grocery Co., Jacksonville, Fla.

Charles Ilfield Co., Albuquerque, N. M.

Hudson House, Inc., Albany, Oregon.

Mick or Mack Stores Co. Inc., Salem, Va.

Ragland Brothers, Chattanooga, Tenn.

Richmond Wholesale Grocery Co., San Francisco,
Cal.

Roundup Grocery Co., Spokane, Wash.

Setzers Warehouse, Jacksonville, Fla.

8. The following were cooperative buying associations
 which sold at wholesale to their retailer members.

Associated Grocers, Albuquerque, N. M.
 Associated Grocers Mutual of Carolina's, Inc.,
 Charlotte, N. C.
 Central Florida Coop., Ocala, Fla.
 Certified Grocers of California, Los Angeles, Cal.
 Charlotte Grocers Mutual, Charlotte, N. C.
 Dennis Wholesale Grocery Co., San Francisco, Cal.
 Dixie Savings Stores, Chattanooga, Tenn.
 Economy Stores, Inc., Norfolk, Va.
 Equitable Cash Grocery, San Francisco, Cal.
 Florida Retail Owned Grocery, Tampa, Fla.
 Frankford Grocery Co., Philadelphia, Pa.
 General Wholesale Co-op., Norfolk, Neb.
 I. G. Food Store, Lafayette, La.
 Louisiana Grocers Co-op Inc., New Orleans, La.
 Bert McDowell Co., Redding, Cal.
 Penn. Mutual Grocery Co., Philadelphia, Pa.
 Quaker City Wholesale Grocery Co., Philadelphia,
 Pa.
 San Francisco Grocery Co. Ltd., San Francisco,
 Cal.
 Spartans Grocers Inc., Los Angeles, Cal.
 United Grocers Ltd., San Francisco, Cal.
 United National Co-op Co. Inc., Boston, Mass.
 Wyoming Valley District Co., Wilkes-Barre, Pa.

9. The following were cooperative buying associations which sold at wholesale to their retailer members and also to non-member retailers:

Associated Grocers, Birmingham, Ala.
 Associated Grocers, Inc., Miami, Fla.
 Associate Grocery Coop., East Point, Ga.

Miami Retail Grocers, Inc., Miami, Fla.
 Richmond Grocery Company, Philadelphia, Pa.

10. The following persons, firms or corporations (i) were retail grocery concerns or (ii) sold or otherwise transferred goods to parent, subsidiary or otherwise affiliated companies which were retail grocery concerns:

American Stores Company, Johnstown, Pa.
 American Stores Company, Philadelphia, Pa.
 Best Markets Inc., Philadelphia, Pa.
 Bruno's Food Stores, Birmingham, Ala.
 Colonial Stores, Inc., Columbia, S. C.
 Colonial Stores, Inc., East Point, Ga.
 Colonial Stores, Inc., Norfolk, Va.
 Colonial Stores, Inc., Raleigh, N. C.
 Colonial Stores, Inc., Thomasville, Ga.
 Columbia Food Co., Portland, Ore.
 Community Cash Stores, Spartanburg, S. C.
 El Paso Wholesale Co., El Paso, Tex.
 First National Stores, Deering Junction, Me.
 First National Stores, Portland, Me.
 Flamingo Wholesale Grocery Co., Miami, Fla.
 Food Fair Stores, Miami, Fla.
 Food Fair Stores, Philadelphia, Pa.
 Food Mart, Inc., Ashley, Tex.
 Golub Corporation, Green Island, N. Y.
 Grand Union Super Markets, Miami, Fla.
 The Great A & P Tea Co., Atlanta, Ga.
 The Great A & P Tea Co., Birmingham, Ala.
 The Great A & P Tea Co., Charlotte, N. C.
 The Great A & P Tea Co., Jacksonville, Fla.
 The Great A & P Tea Co., Los Angeles, Cal.

The Great A & P Tea Co., New Orleans, La.
 The Great A & P Tea Co., Portland, Me.
 The Great A & P Tea Co., Raleigh, N. C.
 The Great A & P Tea Co., Seattle, Wash.
 The Great A & P Tea Co., Yeadon, Pa.
 Hart Food Stores, Rochester, N. Y.
 Henke & Pillot, Inc., Houston, Tex.
 Hill Grocery Co., Birmingham, Ala.
 Hinky Dinky Stores, Omaha, Neb.
 The Kroger Co., East Point, Ga.
 The Kroger Co., Greensboro, N. C.
 Market Basket, Los Angeles, Cal.
 Fred Meyer, Inc., Portland, Ore.
 National Food Stores of Louisiana, New Orleans,
 La.
 Penn Fruit Co., Philadelphia, Pa.
 Red Food Stores, Inc., Chattanooga, Tenn.
 Safeway Stores, Inc., Ashley, Tex.
 Safeway Stores, Inc., Benning, D. C.
 Safeway Stores, Inc., Dallas, Tex. (Garland, Tex.)
 Safeway Stores, Inc., Kearny, N. J.
 Safeway Stores, Inc., Los Angeles, Cal.
 Safeway Stores, Inc., Omaha, Neb.
 Safeway Stores, Inc., Portland, Ore.
 Schwegmann Bros. Super Market, New Orleans,
 La.
 Simonetti Inc., Birmingham, Ala.
 Star Market Inc., Watertown, Mass.
 Tradewell Stores, Inc., Seattle, Wash.
 Von's Grocery Company, Los Angeles, Cal.
 Wegman's Food Markets Inc., Rochester, N. Y.
 J. Weingarten Inc., Houston, Tex.
 Winn-Dixie Hill Inc., Harahan, La.

Winn-Dixie Hill Inc., New Orleans, La.
 Winn-Dixie Stores, Inc., Greenville, S. C.
 Winn-Dixie Stores, Inc., Hialeah, Fla.
 Winn-Dixie Stores, Inc., Jacksonville, Fla.
 Winn-Dixie Stores, Inc., Miami, Fla.
 Winn-Dixie Stores, Inc., Montgomery, Ala.
 Winn-Dixie Stores, Inc., Raleigh, N. C.
 Winn-Dixie Stores, Inc., Tampa, Fla.
 Wissmans, San Francisco, Cal.

The Commission's Exhibits specified in the left hand column of Commission's Exhibits 5160-5168, 5170-5173, 5175-5180, 5196-5203, 5206, 5209-5222, 5224-5225, 5227, 5228, the third entry of 5229, and 5230, state in each case that the private label evaporated milk there involved was sold by the respondent to a person, firm or corporation other than the one designated as "customer" in the above enumerated Commission's Exhibits; and accordingly the respondent does not stipulate or agree that any of the persons, firms or corporations so designated as "customer" was a private label evaporated milk customer of the respondent.

Dated: July 2, 1959.

(Signed) RAYMOND L. HAYS

(Signed) JAMES H. KELLEY
 Counsel Supporting the
 Complaint
 CECIL I. CROUSE,
 350 Madison Avenue,
 New York 17, N. Y.

and
DEWEY, BALLANTINE,
BUSHBY, PALMER & WOOD,
40 Wall Street,
New York 5, N. Y.

(Signed) KEN V. LUKERYBERT
A Member of the Firm
Counsel for Respondent

COMMISSION'S EXHIBIT No. 5309

Mr. Sam Thompson

A. J. Berry, Jr.
July 19, 1957

Paul Hartley telephoned me and gave me the following information:

Winn-Dixie, Greenville, has apparently been running some unusual specials on their Dixie-Home Evaporated Milk. Paul mentioned specials as low as 9c per can. He says that Winn-Dixie has on hand some old uncoded Dixie-Home label which was packed by their former supplier, and now that they are getting their requirements from us, they want to move out this old milk. He does not know the quantity they have, but he is pretty sure that the very low retail price has been an effort on their part to liquidate this old stock.

A few days ago, the owner of LittleJohn Smith Company, Spartanburg, went in to see our Broker, LittleJohn Smith. LittleJohn Smith has a chain of about 30 stores. Paul says that they have always been very cooperative with us. The owner talked to our Broker (McDowell) and said that he was getting a little concerned about these Winn-Dixie specials. He said it was his understanding that we were packing Dixie-Home for Winn-Dixie. He was not angry in the slightest, but he told McDowell that he could not compete with these specials using Armour milk and that he had about come to the conclusion that it would be necessary for him to have his own Private Label, and he asked whether his Company was sufficiently large to be of interest to Borden as far as supplying him a Private Label. He stated that he naturally turned to Borden — first, because he has had past friendly relationship, and, second, because he was in hopes of getting a Private Label at a price competitive to Winn-Dixie.

McDowell referred the matter to Paul. I requested that Paul inform LittleJohn that he had referred the request to the Home Office but that it would be a number of weeks before the request could be acted upon in any fashion, as the several people involved were either away on a trip or away on vacation. Paul said that this would be completely satisfactory. He reiterated that LittleJohn Smith was not peeved in any way but that we should give them the utmost consideration because they had always been so cooperative in connection with sales, merchandising, etc. of Borden products.

In 1956, LittleJohn Smith sold 16,703 cases of Silver Cow, which represented a gain of about 1600 plus cases

over the previous year. For six months of 1957, their sales have been 8,075 cases, which is 875 cases behind the same period of last year.

A. J. BERRY, JR.

2 extra cc to S.T.

COMMISSION'S EXHIBIT No. 5311

Sam—

The attached came yesterday, I talked to Hartley. He has no objections. He says this is a tight co-op with 18 stores at Columbia and 3 at Charleston. We did 1595 cs at Columbia in 1956 and 5300 cs at Charleston (Borden Brand). The agalea label will hurt C & P more than us in these 2 markets.

May I have your and CSS.

JEFF

P. S. This is Chester not Lewisbury and is O.K. with Hunt.

COMMISSION'S EXHIBIT No. 5315

Mr. Paul Hartley
Atlanta Office

December 27, 1957

A. J. Berry, Jr.

Dear Paul:

The latter part of November, A. C. Bowie wrote me as follows:

"Mr. Berry, for your information quite a quantity of evaporated milk is being sold in this market under private labels. Some of our customers have asked us why is it that we do not offer them evaporated milk packed under their private labels. They are buying this milk from our competition and are going to continue to buy it as long as it is cheaper in price than advertised brands. Therefore, under the circumstances, we too would like to have the privilege of offering private label brands of milk for shipment from Chester, S. C. or from whichever plant you may have it to offer for shipment. It will be appreciated very much by us if you will let us have information as to how we are to go about our solicitations for private label brands of milk and how we are to handle the orders after we receive them.

This should have been handled before but with the press of many things I have not been able to get to it.

Under the circumstances, I think it should be handled thru you.

We are in a position to take on a few more selected accounts. Naturally, we prefer to deal with the best and the ones that can do us the most good. We certainly don't want to end up by soliciting a bunch of "peanut" accounts.

I would appreciate it if you would tell Bowie a bit about the set-up and how it is handled. Perhaps he could make a list of accounts in his territory that have P. L., give the estimated yearly volume and then let you have this list. You could add your comments and send the list on to me indicating the ones you think might be OK for us. At that point, we could determine how best to proceed.

Please explain to A. C. Bowie the reason for my not replying direct. It would be a mistake for him to go around soliciting without some advance determination.

Thanks, Paul. My best wishes to you.

Sincerely,

A. J. BERRY, JR.

AJB:ED

COMMISSION'S EXHIBIT No. 5317

INTER-COMPANY AND OFFICE CORRESPONDENCE

To: Mr. O. D. Hall
 From: Paul J. Hartley
 Located At:
 Date: Dec. 18, 1957
 Subject: CONFIDENTIAL

Dear Doyle:

You have known right along of the 10c and 7c specials on Thrifty Maid in the Carolinas. McDowell was able in a very confidential manner to get the attached set of figures covering the sale for forty-five weeks of this year.

You will note that our loss vs 1955 is somewhat greater than Pet or Carnation, but in considering that about 5,000 cases of this is due to being kicked out on small, then our loss on tall size basis would be a little less than the other two.

Thought you would be interested in this information.

Very truly yours,

PAUL

PJH:is
 CC: W. T. Crowe

CONSOLIDATED BROKERAGE COMPANY

WAREHOUSE AND STORAGE
FACILITIES



FOOD BROKERS AND
DISTRIBUTORS

OFFICES AND WAREHOUSES AT SPARTANBURG AND GREENVILLE, S. C.

SPARTANBURG, S. C.

December 10, 1957

Mr. Paul J. Hartley
c/o The Borden Food Products Co.
813 William-Oliver Building
Atlanta 3, Georgia

Dear Paul:

They gave me these figures at Winn-Dixie yesterday for 45 weeks, on Evaporated sales. They have featured private label at .10¢ per can, chain wide for the last few weeks, which don't help our Silver Cow sales any.

Very truly yours,

C. H. McDowell

CONSOLIDATED BROKERAGE CO.

CHM/jv
Enc:

FEDERAL TRADE COMMISSION

DOCKET NO. 7129, IN THE MATTER OF... EXHIBIT A02-318A

IN THE MATTER OF... Borden Company

DATE 6/8/61 WITNESS

See REPORTER, Co. official reporter
By S. M. M. M.

IN CAMERA

EST		CARNATION		SILVER COW	
1955	1956	1955	1956	1955	1956
44167	54431	75283	95625	39226	46011
	45837	82183			
	- 8593	- 12442			
					36929
					- 9082

THIS IS SALES FOR 45 WEEKS.

THEIR PRIVATE LABEL WILL RUN ALMOST 150,000 CASES.

Very Confidential. Paul

9082

500

82

IN CAMERA

FEDERAL TRADE COMMISSION
Exhibit No. 1124 submitted: EXHIBIT 5318B

IN CAMERA

F A

COMMISSION'S EXHIBIT No. 5320

Saleman's Correspondence Paper

Borden's
350 Madison Avenue, New York 17, N. Y.

Received July 18, 1957

Name A. S. McCaughan
Date July 16, 1957
Address 210 N. W. 127 St. Miami
Attention of Mr. P. J. Hartley
Subject

Dear Mr. Hartley,

Charlie Hartz has obtained a letter from Kwik-Chek authorizing Borden salesmen to re-arrange evap. milk sections in their stores to place the private label "Thrifty Maid" between Borden and Carnation.

This is a golden opportunity in many stores — most stores — because if I move any cases of milk it's a sure thing Carnation and Pet won't be improved.

With Van on vacation and with the help of Art Corvin I plan to stay with this until finished. I will let you know the results.

832

Coffee

I will also work coffee on above coverage. Original instructions were to hold coffee sales on Saturdays through July 13th (8 weeks). If we are to continue these sales please let me know.

Best regards,

ALAN

RECEIVED

RECEIVED

MR. P.J. WARTLEY
A.G. McCaughan
JULY 26, 1957
RECEIVED

DEAR MR WARTLEY,

ATTACHED IS A LIST OF KWIK-CHEK STORES SHOWING THE RESULTS OF THE SPECIAL COVERAGE TO INCORPORATE THE PRIVATE LABEL "THRIFTY-MAID" INTO EXISTING EVAPORATED MILK SECTIONS.

WHILE THE NUMBER OF ROWS IS NOT AN EXACT PICTURE OF A MILK SECTION IT IS CERTAINLY CLOSE ENOUGH TO GIVE US AN IDEA OF THE TOTAL MILK DISPLAYED. I POINT THIS OUT ESPECIALLY IN REGARD TO PET WHERE 6 ROWS ON THE SHELF MAY HOLD 6 CASES AND 6 ROWS OF BORDENS ON THE FLOOR MAY HOLD 14 CASES OR MORE.

YOU WILL UNDERSTAND THAT IN VAN'S STORES, I COULD NOT BE CERTAIN OF THE "BEFORE" BECAUSE MANY OF THEM HAD ALREADY BEEN CHANGED WHEN ART CORVIN AND I ARRIVED. I HAVE LISTED SHEET #2 FOR YOUR INFORMATION TO SHOW THE WHOLE PICTURE.

WHERE POSSIBLE WE HAVE PLACED ARMOUR'S MILK NEXT TO BORDEN'S. AS ARMOUR IS SOLD DOWN THE EASY WAY OUT FOR THE STOCK CLERK IS TO FILL THE ROWS WITH BORDENS.

THANKS TO CHARLIE HARTZ FOR ASSIGNING ART CORVIN TO WORK WITH ME FOR EIGHT FULL DAYS.

Best regards,

Dean

KUN-CHER EVAPORATED MILK SECTIONS.									
BEFORE		AFTER		POSITION		NET			
BOR - CARN - PET		BOR - CARN - PET		IMPROVED		ROWS CHANGED			
6	12	12	6	10	6	YES	-2	-6	
14	12	12	14	12	12	YES		-4	
4	4	10	10	4	4	YES	+6	-3	
8	12	12	8	12	8	YES		-4	
10	12	10	10	9	7		+2		
6	12	12	8	12	8	YES		-6	
12	18	12	12	12	12	YES		-2	
4	6	4	4	4	4			-4	
6	12	6	6	8	6	YES		-4	
6	12	6	6	8	6	YES		-2	
4	6	4	4	4	4	YES			
4	4	4	4	4	4	YES			
12	12	12	12	12	12	YES			
6	12	6	6	12	6	YES			
6	6	6	6	6	6	YES			
12	12	12	12	12	12	YES			
12	12	6	12	6	6	YES			
6	8	6	4	4	4	YES	-2	-6	
4	10	6	7	10	5	YES	+3	-4	
12	24	18	18	18	18	YES	+6	-6	
4	8	8	5	12	8	YES	+1	+4	
12	12	12	12	12	6				
6	6	4	6	6	4	YES			
LS:	176	244	200	192	209		+16	-32	
					168				
1201 SUNRISE - EVAP MOVED FROM FLOOR TO SHELF WHICH ACCOUNTS FOR INCREASED CARNATION ROWS.									

2149 BUFFAT	12	12	12	12	12	12
S S. ONE	4	4	4	6	6	12
DELOAY #2	6	12	6	6	4	4
BOMPANO 300	6	6	8	4	12	6
1117 SE. 6th	4	18	4	14	4	4
L. FOREST	14	4	12	4	12	4
S300 NE 2ND	4	4	4	4	4	4
8890 NW 7th	12	12	12	12	12	12
M5 NW 119	12	12	4	4	4	4
954 NW 27	4	4	5	6	4	4
79 ST. Neelach	4	12	8	6	6	6
FLAMINGO	12	8	4	4	4	4
2144 NW 7	4	8	4	4	4	4
2851 NW 27	4	4	4	4	4	4
45 SW 8th	10	4	4	4	4	4
M. SPAINOS	6	12	8	6	4	6
OPA LOCKA	4	8	4	4	4	4
N. MIAMI	4	4	4	4	4	4
2425 SW 8	4	4	4	4	4	4
3801 FIAS	4	4	4	4	4	4
6709 "	4	4	4	4	4	4
2056 RAND	6	6	4	4	4	4
2125 SW 32	4	4	4	4	4	4
1525 CORAL	4	4	8	6	4	6
6609 PEBB.	6	6	6	6	6	6
TOTALS	158	189	138	158	189	138
TOTALS	176	244	200	192	209	168
PAGE #/	334	433	338	350	398	306

PERSONAL FILE

COMMISSION'S EXHIBIT No. 5322

Mr. A. G. McCaughan

Paul J. Hartley
July 31, 1957

Dear Alan:

This will acknowledge with thanks your letter of July 26th to which you attach a complete analysis of the before and after picture showing positions improved, rows gained for Borden's Evap and rows taken from our competitors in connection with re-arranging the milk positions in the Winn-Dixie stores. This represents a very fine piece of work, Alan, and I wish to extend my sincere appreciation. Your report was very detailed and very helpful to me and it will be placed in your personal file.

I am also most appreciative of Art Corvin's good work and by copy of this letter I am extending our appreciation to Charlie Harts for assigning Art to us for the eight days involved. I am asking Charlie to convey our thanks to Art for the good work he did.

There is no question but what this will be of great benefit to us over the long pull in the Miami territory and I think all of you did a splendid piece of work.
Many thanks.

Very truly yours,

PJH:is

CC: W. T. Crowe
Charles Harts
J. H. Hand

COMMISSION'S EXHIBIT No. 5325-B

Sales this month
2 oz. Coffee 6453
5 oz. Coffee 3980
Sales this Mo. last year
3500
10,932

PRODUCT REMARKS

COFFEE I have been in almost constant touch with our Florida brokers relative to opposing ranks and holding listing on 2 oz. regular size as the deal diminishes. Also keeping pressure on closing out on Twin inventories. Hazelrig reports from Tampa that Publix will force and advertise the 581 cases next week (week of August 5th). This will be followed up by W. T. Crowe who will be in that market. He will also do some follow up work in Miami. Supervisor will be in Jacksonville working same.

We have a general 2¢ price advantage on our 5 oz. size with A & P, Colonial and Winn-Dixie in the Carolinas vs Maxwell House in that we have a price of \$1.15 vs. \$1.37 on Maxwell with each of them.

Gill's Instant Coffee getting a terrific play in the way of cooperative advertising in the Charlotte market from the standpoint of price specials and tie-in ads with virtually every advertiser. Newspaper section attached hereto. As per instructions, a careful study is being made of the Coffee situation in all brokerage areas except Florida, at this time.

WEEK ENDING August 3, 1957 NAME Paul J. Hartley

EVAPORTED MILK Pet people are putting increased pressure on obtaining tie-in newspaper and advertising support at this time. This is reported in Columbus, Atlanta and Charlotte. Also reported to me in Greenville this week that instead of any national advertising in that area the Pet local representative has been given a local budget to obtain ad support for a period of two months. Also learned that Pet people have changed their procedure of reporting whereby their salesmen now must report on store positions and competitive rows in the same manner as Carnation men.

Winn-Dixie people in the Greenville unit followed the 9¢ specials on private label with a 10¢ chain-wide feature on same. This continues to concern the Community Cash people in the Spartanburg area and it is obvious that if this continues Community Cash will continue to try to combat it with Armour's or some other off brand or a private label of their own which will take the long standing support from us.

Evap sales this month 65,388 Sales last month 50,695
WEEK ENDING Aug. 3, 1957 NAME Paul J. Hartley

STARLAC The fact that we have for sometime had and held a price advantage on 12 Quart vs Carnation's 8 Quart in the Greenville, S. C. area has helped us considerably. 12 Quart appeared to still be selling very good in the stores visited this week. This price advantage in our favor still exists with both the important Winn Dixie and Colonial Store units as follows:

Colonial Carnation 8 Quart 79¢ — Starlac 12 Quart 89¢
 Winn-Dixie Carnation 8 Quart 75¢ — Starlac 12 Quart 85¢
 A & P, Charlotte unit, pushing their large size powder and still refuse to stock a competitive large powder.

Cloverleaf continues with local TV advertising in Atlanta area.

Sales this year Total Pounds 368,458 — Week Ending Aug. 3, 1957

Sales this month last year 341,808
 Name 'Paul J. Hartley

COMMISSION'S EXHIBIT No. 5327-B

PRODUCT REMARKS

COFFEE Since W. T. Crowe's detailed report covers the Rich Roast progress in detail, I will simply state that Winn-Dixie, Greenville, and Colonial, Columbia, remain as the only distribution hold-outs at this writing. Both of

these have restocked 5 oz. size. Twin Pack pending and being worked hard by all concerned.

Detail progress has gone off in fine fashion insofar as the time-table is concerned. We were greatly assisted by the very capable outside help. As of today, all markets except Greensboro, Charlotte and Knoxville have been totally completed with a fringe of secondary trade remaining to be handled this week in these three markets. Major portion of the primary trade was covered by the end of two weeks.

Competition by all primary and secondary factors extremely keen and being stepped up. We have already seen signs of Maxwell House, NesCafe and Chase & Sanborn fighting back to undo what we are able to do. Also have heard some unconfirmed reports that NesCafe has something big working.

WEEK ENDING Nov. 2, 1957 NAME Paul J. Hartley

EVAPORATED MILK Winn-Dixie ran Thrifty Maid special at 10¢ throughout Carolinas this week. They continue to keep advertised brands cut back to the bone and spread Thrifty Maid. Of course, competition is suffering along with us and our space remains proportionately as good as it has been in the past vs Pet and Carnation. This is not only hurting us and other advertised brands from the standpoint of support by Winn-Dixie, but is keeping us from being able to get tie-in features from the smaller factors, who have to compete with the chain, in that they are forced to fight this with Armour's or their own private

label. It seems that where they can do nothing to combat this with some other milk that they run some other commodity as a loss leader.

Carnation is now in the process of covering the trade working their special promotion on pumpkin pie with recipe leaflets and other point of sale material. On this same recipe leaflet, they have other recipes "for smoother holiday eating" featuring cream sauce, gravy and five minute fudge. Our Evap featured this week at White Stores, Knoxville, 6/89¢

WEEK ENDING Nov. 2, 1957 NAME Paul J. Hartley with TV advertising, displays, and special posters made up by their merchandising dept.

STARLAC White Stores, Knoxville, Tenn. this week featured 12 Quart Starlac in connection with their Stock Up Time Promotion with displays in all of their 42 stores. They also had TV advertising in this connection and special posters made up by their own merchandising department.

We received quite a bit of suport from the leading chains on our Starlac contract from Colonial, Kroger, A & P and Winn-Dixie throughout the district. A & P, Atlanta, ran both 8 Quart and 5 Quart at a special price of 29 and 39¢ this week — this was marked "week-end special" and was a large banner type ad.

A & P in the Carolinas featured Carnation milk solids 9.1 oz. carton at 30¢ this week. With the retail men getting back into their own territories after working Rich Roas

for the past two weeks, they will have more of an opportunity to book out displays and follow through on shelf work in the face of the new Pet package which is gradually coming into the territory replacing the jar and reported selling extremely good.

Week ending Nov. 2, 1957

Name Paul J. Hartley

COMMISSION'S EXHIBIT No. 5329-A

PRODUCT REMARKS

COFFEE Borden's Instant Coffee in the Charlotte Area does not enjoy too much movement or shelf space in the stores. We are running a poor fourth in the stores and in the majority of, the stores the off brands have approximately just as much space on the shelf as we do. Winn-Dixie Stores advertised 6 oz Astor for 99¢ and also advertised the 6 oz Chase and Sanborn for 1.23. A & P continues to advertise their instant coffee in all of the markets. The off brands are getting quite a bit of advertising support in many of the markets. In the Atlanta Area, Nescafe advertised the 6 oz with 15¢ off label deal as being available in this market for purchase. I have not had the opportunity to observe the stores to see if they actually have the stock or not.

WEEK ENDING August 16, 1957

NAME J. M. Hand

EVAPORATED MILK The evaporated milk picture remains highly competitive throughout most of the markets with the Chains promoting their private labels. They are

giving these labels prominent display space in all of the stores and it is getting rather difficult to get extra space.

Carnation is currently pushing the Fluffy Fruit Pie with variations. This recipe is tied in with Spry, Carnation and Gold Medal Flour as the attached recipe leaflets. They are getting some displays in the stores and placing the point-of-sale material.

Carnation is also pushing a chocolate soda made with Carnation Chocolate Drink and root beer. Recipe is attached to this report.

This week-end in Atlanta, Pet has their evaporated milk advertised at 3/39¢ in the Big Apple Stores in conjunction with Big Apple birthday.

WEEK ENDING August 16, 1957

NAME J. M. Ha

STARLAC Pet is continuing their present push on the butter milk recipe and point-of-sale in most markets. We are planning a counter attack with our butter milk recipes which, have been ordered for each man in the district. Shelf-wise we are in pretty good shape in most of the stores, but some of the merchants tell me that Starlac is not moving like it used to. Under these circumstances I recommend him handling all sizes to determine which one or two or three will be best for him to handle.

Carnation Instant has a Cranberry Chiffon Freeze recipe which they are presently pushing, as per attached recipe.

WEEK ENDING Aug. 16, 1957

NAME J. M. Ha

COMMISSION'S EXHIBIT No. 5331

INTER-COMPANY AND OFFICE CORRESPONDENCE

To: Mr. W. J. Wilkes
From: L. S. Merrill
Located At: San Francisco
Date: May 3, 1957
Subject:

Dear Bill:

This will confirm our telephone conversation earlier today in which I advised you that we had complaints from most of our Evaporated Milk private label customers in District 12 about the billing price on March shipments. You advised me on the phone that some clerk had made a mistake and used the Modesto price instead of Albany. I appreciate your prompt action and teletype advising that corrected invoices are being sent air mail today.

This mistake was most unfortunate because, as I told you, we had a telephone call from Frank Wray in Portland reporting that several customers had called him, together with letters from Johnson-Lieber, Seattle, and Olson Brokerage, Spokane, reporting they had complaints from each of their private label customers.

As you know, we have encountered several mistakes in the past in connection with freight charges, and I am sure you appreciate that none of these errors make it any easier to keep our good customers happy. My urgent hope is that

the Washington customers did not start to look for other sources of supply because of high price billed in earlier

JERRY
L. S. MERRILL

LSM:wb

cc: Mr. O. D. Hall
Mr. A. J. Berry, Jr.

COMMISSION'S EXHIBIT No. 5332
BORDEN'S

Established 1857

March 14,

Mr. Frank Wray
Portland, Oregon

Mr. John Forehand
Olson Brokerage Co.
Spokane, Washington

Mr. Jack Flynn
Johnson-Lieber Co.
Seattle, Washington

Gentlemen:

When we first talked with you and our customers about private label evaporated milk, we explained that the COTM (cost other than milk) figure would be reviewed about every six months and adjustments made as cost required. It so happens that because of pressure of other things in our home office, these costs were not reviewed for more than a year. In the meantime, we have had increases in the cost of tin plate, increases in wage contracts, increases in fuel costs, increases in hauling costs, and our most serious problem is there has been a reduction in the amount of milk available to our Albany, Oregon, plant. Due to the lower quantity of milk, our cost per case has automatically increased.

Because of these factors, we have found that it is necessary to immediately increase our COTM figure by 20¢ per case. This will become effective close of business March 15, 1957. This means that our estimated price on tall size, not including labels, F.O.B. Albany, will be \$5.35 to \$5.58 for the last half of March.

I am sure our customers are somewhat familiar with these increased costs and probably have wondered why we have not reflected them sooner. Our error in this regard has been of course to the customer's advantage.

Obviously, we and other manufacturers have the same increased costs on our own brands, and I don't imagine any one will be happy about absorbing these costs much longer.

Will you please advise our private label customers accordingly.

Sincerely,

(Signed) L. S. MERRILL
L. S. Merrill

LSM:ab

cc: J. B. Irelonger
A. J. Berry, Jr.

COMMISSION'S EXHIBIT No. 5359

Mr. L. S. Merrill
The Borden Food Products Co.
461 Market Street
San Francisco 5, Calif.

E. H. Bulger
New York City
Sept. 30, 1957

Thanks for your letter of September 27th together with your assistance in connection with M.P.A., Modesto.

This morning we received their check mailed September 24th in the amount of \$6362.00 paying invoices from August 2 to August 9. They now owe \$48,816.00 covering invoices from August 12 to September 19.

Frankly, we are very concerned regarding this account, both from a credit standpoint and in connection with their recent internal changes and if you could possibly arrange your schedule to see them as soon as possible, it sure would be appreciated.

We are anxious to ascertain the story behind these recent changes and at the same time have it understood with them that we shall expect payments to be made on a weekly basis with terms of no later than 30 days.

We will keep you posted of all developments in connection with this account.

E. H. BULGER
Credit Manager

EHB/la
Via Air Mail
cc: Mr. A. J. Berry

COMMISSION'S EXHIBIT No. 5372-A

Mr. L. S. Merrill
San Francisco Office

A. J. Berry,

PERSONAL & CONFIDENTIAL

December 10, 1957

Dear Jerry:

In reply to yours of December 4, I'm giving you some more F.O.B. Plant figures.

1. One sheet contains costs at Albany and Modesto small size for November and December 1956, plus the first 10 months of this year. That gives you a year's record. To the present, small cartons have been furnished to us at Modesto, so I don't know the exact price of plain stencil cartons. We've used the Albany cost.

2. Sheet 2 gives you Albany and Modesto tall for November and December 1956 and for October 1957. With the figures I left with you, you have a year's record. The Albany price on cartons is used at Modesto for the same reason as mentioned in 1 above.

3. Your question about the margin included in COTM's is rather difficult to answer. The planned margin at Albany was \$.20 per case, tall size, and \$.10 per case, small size; at Modesto, \$.15 per case, tall size, and \$.07 per case, small size. Under our old review system, we

review COTM's twice each year in the light of experience for the most recent 6 months, i. e., we'd review in August for January to June and in February for July to December. The trouble was that if variations crept in, it was 8 to 9 months before we caught up with them. Albany was the best example. COTM's at Albany were based on milk receipts of some 28,000,000 lbs. per year. All of a sudden, we woke up to the fact that a lot less milk was flowing through and instead of a \$.20 profit, we were experiencing an actual loss.

Accordingly, the Cost Department makes a monthly comparison for us now. This compares the number of cases put through each month with the same month the previous year and gives the actual cost per case for each month. It gives the variation over (under) cost per case for the current month vs. the same month the previous year and the cost per case by which current COTM rates exceeds the previous year's actual cost.

I have arranged with Doug Logie to send you this review each month for Albany and Modesto. Meanwhile, here is the record for this year since the system was installed.

<i>Planned Margin Tall 48's</i>		<i>Actual Margin to Date</i>							
<i>in current COTM Rates</i>		<i>As at the close of each month 1957</i>							
		<i>Mar.</i>	<i>April</i>	<i>May</i>	<i>June</i>	<i>July</i>	<i>Aug.</i>	<i>Sept.</i>	<i>Oct.</i>
Albany	.20	.1524	.2247	.2481	.2456	.2255	.2285	.2218	.2172
Modesto	.15	.2950	.2581	.2485	.2355	.2364	.2276	.2283	.2299

COMMISSION'S EXHIBIT No. 5372-B

Mr. L. S. Merrill

December 10, 1957

This enables us to watch a trend at each plant. It (the margin) will shrink during the Winter because of less units going through. We can see what's happening and can make a change at one or more plants quickly, if necessary. This review system was installed last March when we found we were in the red at Albany and in bad shape at other points.

I hope the above will help answer your question.

Sincerely,

A. J. BERRY, JR.

AJB:ED

COMMISSION'S EXHIBIT No. 5404

July 15, 1957

Mr. John B. Commander
General Public Relations Manager
Colonial Stores, Inc.
P. O. Box 4358
Atlanta 2, Georgia

Dear John:

Thank you very much for your letter of July 3 asking our opinion of advising South Carolina farmers supplying milk

to our Chester plant that CS brand is a product of their farm.

We discussed this suggestion thoroughly with our Public Relations people who have had a lot of experience dealing with producer groups. It is their opinion that the suggestion would be difficult to carry out and that it might create some undesirable problems for you as well as for us. This opinion is based on various past efforts to communicate ideas to producer groups — efforts that were often abandoned because we encountered problems peculiar to farm communications with a shifting producer list.

Business people understand the practice of manufacturers turning out products for other distributors, but, apparently farmers in the main do not. Publicity about our arrangement could be very unsettling because it would undoubtedly touch off all kinds of rumors, and these spread far faster in a rural area than in a city. We know from experience that you can't forecast the shape that a rumor will take.

I know you understand our desire to cooperate with you in every possible way, and I hope that you will appreciate our position in this matter.

Very truly yours,

O. D. HALL

DDH:jc

COMMISSION'S EXHIBIT No. 5456

Mr. A. J. Berry

O. D. Hall
April 18, 1957

As you will recall, last May when we reduced our manpower authorizations in order to bring our field sales costs more in line with our sales trends, we decided to eliminate the duplicate coverage where it existed between full line and special evaporated milk salesmen. We, however, want to retain and add to the benefits that had accrued in our use of special evaporated milk salesmen in many markets. We decided to eliminate the classification of Evaporated Milk Salesman. We eliminated duplicate routes and assigned these men to full line work, but have allowed time in their schedule for them to do medical work or special coupon work in their coverage plan. For lack of a better classification we called these men Combination Full Line-Evaporated Milk Salesmen.

As we have moved along with this operation, it is increasingly evident that we need to further refine and define this particular job classification. As per our conversation, we are studying the work of each individual salesman. Where it is found that a salesman, according to plan, actually is devoting less than one day of the five working days in a week to either medical work or other special designated work on Evaporated Milk, we intend to throw these men into the classification of Full Line Salesmen in order to prevent confusion and to more accurately allocate costs to you.

As Starlac bears part of the cost or medical detail work done by these men, it will then be up to you and Starlac to determine the percent of cost that should be allocated to these men in a total, and the amount that is to be divided between the two products. As a guide, the only work that is done on Starlac is when these men make a physician or hospital call. Also, it would be my suggestion that you and Starlac absorb 20% of a cost of a man, with the 80% going to full line charges. We will advise you of the exact number of men, by districts, that are to be considered as Combination Full Line Salesman. This should clarify the job classification and more accurately allocate costs. You will realize, however, that there will be full line men who are devoting less than 20% of their time either to medical or special evaporated milk work, but it is impossible to charge your product accurately for this work. These men, however, should continue to receive the materials from your department necessary to carry on any medical work they are currently doing, and we will furnish you with a list of these men.

O. D. HALL

ODH:jc

cc: Messrs. Strickler

Thompson

Cleary

COMMISSION'S EXHIBIT No. 5479-A

May 17, 1960, in claimed justification of
Price Differences between Borden Brand and
Private Label Evaporated Milk - Year 1957.

The respondent, on May 19, 1960, put into evidence as RX 76 a cost study of their price differentials during the year 1957 between Borden brand and private label evaporated milk. Although the period covered by the complaint was from January 1, 1956 to March 31, 1958, the cost study was limited to the year 1957.

The respondent sold Borden brand evaporated milk through its Food Products Division to wholesale grocers, chain grocery stores and independent retail grocery stores. The sales were made by the respondent's own salesmen in most areas and by food brokers in the remaining areas. The Borden brand evaporated milk was sold at a uniform price throughout the country for each size can. It was packed in four different sizes and during the year 1957 was sold in the following quantities:

Size	Cases Sold	Cases Sold Tall 48
Tall 48's	3,944,033.39	3,944,033.39
Small 48's	565,595	282,797.50
Small 96's	77,055	77,055.00
Confectioners	10,524.83	10,524.83
Total		4,314,410.72

The price of the tall 48's was \$6.30 per case at the beginning of 1957 and on March 30, 1957 was raised to \$6.45, and on November 19, 1957 was increased to \$6.60 per case. The price for the small 48's was one-half of the price for the tall 48's.

In contrast to the uniform delivered Borden brand price the private label price was f.o.b. plant and varied with the packing plant and changed from month to month with the cost of milk. The price was computed as follows:

IN CASE OF
FEDERAL TRADE COMMISSION
DATE 6/8/60
ACE REPORTING CO. Official Reporter
By Jm

COMMISSION'S EXHIBIT No. 5479-B

1. Average milk cost for the month.
2. Cost other than milk (C.O.T.M.), which represented the processing costs plus a gross margin. This varied between plants.
3. Cost of hauling milk to processing plant.
4. Cartons at actual cost.
5. Labels at cost unless supplied by customer.
6. Credit for spoils allowance of 1/10 of 1% of billing price.
7. Freight was prepaid for the account of the customer and the amount was included on each invoice.
8. Invoice prices were net and not subject to cash discount.

During the year 1957 the records of respondent show that the following quantities of private label evaporated milk were sold by the respondent:

<u>Size</u>	<u>Cases Sold</u>	<u>Cases Sold</u> <u>Tall 48 Basis</u>
Tall 48's	1,052,553	1,052,553
Small 48's	104,288	<u>52,144</u>
Total		<u><u>1,104,697</u></u>

The respondent's cost study has been reviewed and the underlying accounting records and other data have been checked. A summary has been prepared of the price differences and the cost differences between the sale and distribution of Borden brand and private label evaporated milk by the respondent during the year 1957. The sales were limited to shipments from the respondent's Chester, S. C. and Lewisburg, Tenn. processing plants. The summary shows a net price difference, after deducting damaged goods and cash discount, of \$1.4181 per case while the total cost difference was \$1.0156 which indicated a cost failure of \$.4025 per case. The respondent's cost study showed a cost difference over price difference of \$.1891 per case. "The price and cost adjustments which changed the respondent's cost justification to a cost failure are explained in the text following the summary comparison."

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FEDERAL TRADE COMMISSION

UNITED STATES DEPARTMENT OF COMMERCE 5479-C

859

COMMISSION'S EXHIBIT No. 5479-C

Summary of Price Differences and Cost Differences between Sale and
Distribution of Borden Brand Evaporated Milk with Private Label
Evaporated Milk for Shipments from Chester and Lewisburg Plants -
Year 1957.

	Borden Brand			Private Label			Difference per Case
	No. of Cases	Total Amount	Per Case	No. of Cases	Total Amount	Per Case	
Sales	334,971	\$2,169,310.15	\$6.4761	334,971	\$1,648,865.71	\$4.9224	\$1.5537
Sales Deductions:							
Damaged Goods		3,751.68	.0112		1,648.87	.0049 -	.0063
Cash Discount		43,311.17	.1293		- -	-	.1293
Net Sales		\$2,122,247.30	\$6.3356		\$1,647,216.84	\$4.9175	\$1.4181
Labels and Cartons		\$ 56,777.58	\$.1695		\$ 66,625.73	\$.1989 -	\$.0294 1/
Primary Freight		87,192.95	.2603 -		837.43	.0025 -	.2578
Secondary Freight		3,751.68	.0112		-	-	.0112
Warehouse Storage		23,112.00	.0690 -		-	-	.0690
Assignment Storage		10,216.61	.0305		-	-	.0305
Investment in Accounts Receivable & Inventories		-	-		-	-	-
Premium Label Redemption		75,267.98	.2247		-	-	.2247
Advertising		39,794.55	.1188		-	-	.1188
Sales Department		97,677.54	.2916		301.47	.0009	.2907
Brokers' Commissions		13,197.86	.0394		4,220.63	.0126	.0268
Promotion Department		6,330.95	.0189		4,120.14	.0123	.0066
Merical Expense		5,058.06	.0151		2,076.82	.0062	.0089
Total Costs		\$ 418,378.74	\$1.2490		\$ 78,182.22	\$.2334	\$1.0156
Cost Failure							-\$.4025

1/ Denotes red figure.

105

Private Label. - The private label sales were accumulated from the sales invoices and settlement sheets on shipments from the Chester, S. C. and Lewisburg, Tenn. plants, during the year 1957, as follows:

Plant	Size	No. of Cases	Sales Amount
Chester	Tall/48's	142,680	\$ 699,860.81
	Small/48's	8,526 1/	40,971.53
Lewisburg	Tall/48's	178,519	882,584.83
	Small/48's	5,246 1/	25,448.54
Total		334,971	\$1,648,865.71
Average price per case			\$4.9224
1/ Tall size basis.			

The individual private label shipments from the Chester plant are shown on CX 1085-1287 and from the Lewisburg plant are shown on CX 1527-1649 and on CX 2101-2113. Tabulations of the Chester shipments are shown on CX 160-5173 and of the Lewisburg shipments on CX 5202-5217. The sales prices, as shown by the invoices, represent the f.o.b. plant prices. When the freight was prepaid, the amount was added to the invoice and collected from the customer.

The private label evaporated milk sales, as shown by respondent's cost study, represented an accumulation of sales from all plants.

Borden Brand Sales. - Sales of Borden brand evaporated milk, as shown by respondent's cost study, were accumulated from the regular monthly sales tabulations. These sales included sales from all plants and in many areas, such as Chicago, where no private label sales were made. In addition, such sales data included sales of Borden brand in other areas prior to the first sale of private label in those areas. For example, the first shipment of private label from the Chester plant was made in May 1957. In addition, the Borden brand sales included sales of small 96's and confectioner's size, neither of which was packed for private label customers. All of these factors affected the average price of the Borden brand as shown by respondent's report.

In order to eliminate these extraneous factors, the Borden brand sales have been computed on the basis of the identical quantities of private label shipments and have been priced at the prevailing Borden brand price in effect at the date of shipment of the private label. The average price per case of the Borden brand thus computed was \$6.4761 which, compared with the average private label price, resulted in a difference of \$1.5537 per case which difference was due solely to price.

The Borden brand evaporated milk was sold at the same delivered price throughout the country subject to a 2% cash discount. The private label evaporated milk was sold f.o.b. plant on a net cash basis, as heretofore explained.

Damaged Goods. - The respondent on the Borden brand offered a swell allowance of one-tenth of one percent of purchases to customers in lieu of replacement or credits for damaged goods. In addition, payments to warehousemen for repacking damaged cases or cost of replacing damaged cans in retail stores were included in this expense. The average expense of \$.0112 per case for damaged goods on Borden brand claimed by respondent was accepted.

Private label customers, likewise, were offered a swell allowance of one-tenth of one percent of purchases in lieu of damaged goods. All customers buying from the Chester and Lewisburg plants received the allowance which averaged \$.0049 per case.

Cash Discounts. - As previously stated, no cash discount was offered to private label customers. However, purchasers of Borden brand were offered two percent cash discount for payment within 10 days. Purchasers of Borden brand evaporated milk usually purchased other products from the Borden Food Products division and a check of the cash discounts for the whole division showed a total of 2.01%, or slightly in excess of the discount offered. The explanation for this was that practically all customers take the cash discount and that the allowance of the cash discount on some grocery items carrying consumer refunds resulted in an average cash discount slightly in excess of two percent. The two percent cash discount on the Borden brand averaged \$.1293 per case.

Labels and Cartons. - The cost of Borden brand labels and cartons used in production during 1957 were accumulated from monthly plant reports of manufacturing materials for the Chester and Lewisburg plants. These costs averaged \$.1695 per case for the tall 48's and small 48's packed at those plants. The respondent's claimed cost of \$.1789 per case included the cost of labels and cartons for all plants and small 96's and confectioner's sizes.

Private label costs were accumulated from the same factory records, but, in addition to label and carton costs, included the labor cost of stenciling product and customer identification on plain cartons. All of these costs varied between brands and, more important, some private label customers furnished the labels or the cartons, or both. The respondent, in its cost study, divided the total cost of the labels and cartons which it purchased by the total quantity of cases packed, some of which were supplied without cost by the private label customer, to arrive at the average cost per case. The respondent erred in this calculation. The correct method is to divide the total cost of labels, cartons and stenciling by the number of cases on which the respondent purchased the labels

8053

107

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5

of cartons or did the stencilling, thus excluding the cases for which the customer supplied the labels or printed cartons.

On this basis the average cost of labels, cartons, and stencilling on private label evaporated milk packed at Chester and Lewisburg was computed at \$.1989 per case, as follows:

	Total cases packed	Total applicable cases	Cost per case
Cartons	357,437	357,437	\$.0943
Stencilling	357,437	356,487	.0080
Labels	357,437	42,014.5	.0966
Total cost			<u>\$.1989</u>

The average cost per case as computed above was higher than the corresponding cost on the Borden brand and resulted in an adverse cost differential of \$.0294 per case.

Primary Freight. - As stated by respondent's cost report, primary freight on Borden brand consisted of:

1. Cost of shipment from plants to customers, storage warehouses, consignment warehouses, and other Borden plants.
2. The cost of shipment from storage warehouses to customers and consignment warehouses.

The respondent accumulated the primary freight costs on the Borden brand for shipments from all plants during the year. The respondent computed the primary freight cost on the Borden brand, as follows:

Freight on shipments from plants	\$1,416,964.22
Freight on shipments from storage warehouses	<u>161,777.06</u>
Total	\$1,578,741.28
Adjustment for freight on shipments included in inventory (net)	<u>19,308.73</u>
Total outbound freight	\$1,598,050.01
Less:	
Charged to customers on stop-off shipments	\$3,263.40
Claims, etc.	<u>5,509.87</u>
Net Cost	<u>8,773.27</u>
	\$1,589,276.74
Cost per case sold	<u>\$.3684</u>

A recapitulation was made of the freight on Borden brand shipments from the Chester and Lewisburg plants from the same source data as the respondent's summary for all plants. The cost of freight shipments from reserve warehouses and the freight cost included in the opening and closing inventories could not be classified by processing plant. Consequently, the computed freight cost, as shown by the following tabulation, for the Chester and Lewisburg plants represented the average outward freight cost per case for those plants plus the average cost per case applicable to all plants for shipments from reserve warehouses and net freight cost in inventories.

<u>Borden Brand</u>	No. of cases	Freight Cost	Freight cost per case
Freight on shipments from:			
Chester Plant	620,772.5	\$118,043.61	\$.1902
Lewisburg Plant	925,859	222,757.52	.2406
Combined	1,546,631.5	\$340,801.13	.2204
Freight from Reserve Warehouses		\$161,777.06	
Freight in inventories (net)		19,308.73	
		<u>\$181,085.79</u>	
Less:			
Charges to customers on stop-off shipments		\$ 3,263.40	
Claims, etc.		<u>5,509.87</u>	
		<u>\$ 8,773.27</u>	
Subtotal - applicable to all plants	4,314,410.72	\$172,312.52	.0392
Total primary freight - Chester and Lewisburg plants			<u>\$.2603</u>

As previously noted, private label evaporated milk was sold to customers on the basis of f.o.b. plant. However, the respondent generally prepaid the freight and added the amount to the customer's invoice. Also, small sized cans were not produced at all plants and the freight cost of shipping to another plant was not always collected from private label customers. Although the Chester plant did not produce small 48's, the freight from Lewisburg to Chester was included in the customer's invoice.

The computation of the primary freight on private label evaporated milk was based on the freight cost of the shipments from the Chester and Lewisburg plants, as follows:

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 FEDERAL TRADE COMMISSION
 COMMISSION EXHIBIT No. 5479-H

IN CAMERA

Plant	No. of cases	Freight cost	Freight charged to customers	Net Freight Cost	
				Amount	Per case
Chester	44,865.5	\$ 8,869.84	\$10,998.16	\$2,128.32	✓
Lewisburg	190,607	65,347.63	62,625.50	2,722.13	
	235,472.5	\$74,217.47	\$73,623.66	\$ 593.81	\$.0025

✓ Indicates credit.

The excess of freight collections by the Chester plant represents freight on smalls shipped from Lewisburg to Chester for account of customers. Freight cost on smalls was paid by Lewisburg but collected by Chester. The freight collected almost balanced out with the freight paid, so that the net freight cost on private label amounted to only \$.0025 per case.

Secondary Freight. - As stated in the respondent's cost report, secondary freight consisted of the freight costs incurred in shipping Borden brand evaporated milk from consignment warehouses to customers. These shipments generally included other Borden brand products and it was necessary to segregate the freight applicable to the evaporated milk. This was estimated on the basis of a sample of the freight bills paid. The method used appears reasonable and the average cost per case of \$.0112 has been accepted and applied to the Borden brand shipments from the Chester and Lewisburg plants.

Reserve Storage. - Borden brand evaporated milk was stored under refrigeration in so-called reserve warehouses, all of which were commercially operated with the exception of one at Elkland, Pa. and one at Macon, Miss. operated by the respondent. Shipments were made in carload lots from the producing plants to the warehouses and from the warehouses to customers or consignment warehouses. Private label evaporated milk was not stored in reserve warehouses, but was shipped directly to customers.

The warehouse charges were accumulated from the accounting records of the respondent. The expenses at Elkland were included together with the charges at Macon which were based on commercial rates. In addition, adjustment was made for the storage charges paid on the year's opening and closing inventories in reserve warehouses. The reserve storage expense averaged \$.0690 per case on the Borden brand, computed as follows:

Commercial warehouse charges	\$227,241.04
Expenses at Elkland	21,019.97
Charges at Macon	13,507.68
1956 Payments applicable to 1957 sales	71,551.34
1957 Payments applicable to 1958 sales	35,754.91 1/
Total reserve storage expense	<u>\$297,565.12</u>
Cost per case sold	<u>\$.0690</u>
1/ Denotes red figure.	

The quantity of Borden brand produced at the Chester and Lewisburg plants put through the reserve warehouses and the applicable expense could not be ascertained without examining voluminous detail. It is believed that the applicable charges would not vary materially from the national average expense per case claimed by respondent. Consequently, the average cost of reserve storage of \$.0690 per case has been accepted.

Consignment Storage. - Borden brand evaporated milk was stored in consignment warehouses in carload lots from the producing plants and reserve warehouses. The respondent's West Street warehouse was used in New York City. In all of these warehouses other Borden brand products were stored. These warehouses were used to fill less than carload orders of evaporated milk and other products.

The storage charges applicable to Borden brand evaporated milk were computed from the storage invoices submitted by the commercial warehouses. The expense of operating the West Street warehouse was allocated between evaporated milk and other products on the basis of commercial warehouse storage rates.

The total cost of consignment storage claimed by the respondent was as follows for the year 1957:

Payment to commercial warehouses	\$108,399.06
Applicable West Street warehouse costs	<u>23,375.33</u>
Total consignment storage expense	<u>\$131,774.39</u>
Cost per case sold	<u>\$.0305</u>

The Borden brand evaporated milk produced at the Chester and Lewisburg plants lost its identity when it was moved into the consignment warehouses. Consequently, the costs applicable to the milk from those two plants could not be ascertained. The average cost per case claimed by the respondent for consignment storage has been accepted.

IN CAMERA

Interest on Investment in Accounts Receivable and Inventory. - The respondent included in its cost study a claim for interest on investment in accounts receivable and inventories. The interest was computed at the rate of 8% per annum on the annual average amount of accounts receivable and the annual average amount of inventories in plants and warehouses. The interest on investment was computed on accounts receivable and inventories of Borden brand and private label evaporated milk, as explained in the respondent's cost study.

The inclusion of interest on investment in accounts receivable and inventory has not been accepted as an element of cost for the reason that it is considered to be a payment for the use of capital and not a cost of production and distribution. Any interest that a company may pay on borrowed money amounts to a reduction of the profit or return the stockholders would have received had they elected to borrow part of the capital requirements of the business. In other words, the fact that a company elects to borrow part of the funds, or to use some or all of the surplus, does not affect the cost of producing and selling its products.

Premium Label Redemption. - The label for the Borden brand evaporated milk contained a premium coupon which was redeemable for merchandise. The redemption of the premiums was handled by Premium Associates, Inc. which was 25% owned by the respondent and which, also, handled redemptions for coupons of other companies.

The redemption costs consisted of regular monthly payments based on the number of coupons redeemed and payments in connection with special offers. The respondent also allocated to this account the amount of the adjustment which was made at the end of the year to the reserve which was maintained to take into account payments which would be required in future years to redeem premium labels issued in 1957.

Premium labels were used on the respondent's brands of condensed milk so it was necessary to allocate the redemption cost between the two products which was done on the basis of the number of coupons issued during the year on the two products.

As the monthly payments were made only to cover the cost of the redemption expense of Premium Associates, Inc. applicable to the coupons of the respondent the total amount has been reduced by the 25% of the net income for the year accruing to the respondent. In addition, upon checking it was found that the redemption reserve had not been computed correctly. Consequently, the Premium Label Redemption cost claimed by the respondent of \$2316 per case has been reduced because of these two adjustments to \$.2247 per case, as follows:

COMMISSION'S EXHIBIT No. 5479-K

IN CAMERA

Regular monthly and special payments to Premium Associates, Inc.	\$945,507.60
Less Borden share of 1957 net income of Premium Associates, Inc. 25% of \$71,757	<u>17,939.00</u> <u>\$927,568.60</u> <u>65,195.13</u> <u>\$993,763.73</u>
Net redemption cost	
Plus addition to reserve for redemption	
Total Premium Redemption Cost	
Cost allocated to Evaporated Milk (97.43%)	<u>\$967,291.40</u>
Cost per case sold	<u>\$.2247</u>

Advertising. - The respondent claims that all advertising expenditures were on Borden brand products and that none of the expense was applicable to private label evaporated milk. The total advertising cost for 1957 was \$7,151,602 for Borden brand products. In addition, the respondent paid \$297,519.42 in direct charges to Borden brand evaporated milk and \$7,017.79 was allocated from the advertising department expenses based on the estimated work load.

The respondent included the budgeted advertising expense assigned to evaporated milk and a portion of the advertising not assigned to products based upon the percentage of Borden brand evaporated milk of total sales of Borden brand products, as follows:

Respondent's Claim:

Budgeted advertising assigned to evaporated milk	\$118,880.00
Allocation of advertising based on sales (2.926%)	115,855.91
Direct charges to evaporated milk	297,519.42
Allocation of Advertising Department expense	<u>7,017.79</u>
Total	<u>\$539,273.12</u>
Cost per case sold	<u>\$.1250</u>

The advertising budget for evaporated milk was based on 2¢ per case on sales of all evaporated milk for the prior year. Since this budget amount was arbitrary the non-direct advertising expense was allocated entirely on the basis of sales dollars. In addition, direct advertising charges included "Red Scissors" advertising in connection with the premium redemption program which involved both evaporated and condensed milk. Consequently, the portion applicable to condensed milk has been deducted. The amount of advertising expense applicable to Borden brand evaporated milk has been recomputed, as follows:

8089

Direct advertising charges to evaporated milk	\$297,519.42
Less: "Red Scissors" advertising applicable to condensed milk	<u>1,408.41</u>
	\$296,111.01
Allocation of Advertising Department expense	7,017.79
Allocation of total advertising of Borden Brand based on sales (2.926% of \$7,151,602)	<u>209,255.87</u>
Total	<u>\$512,384.67</u>

Cost per case sold \$.1188

Sales Expenses. - The respondent claimed that its sales force was used solely to sell and to promote the sales of Borden brand products and that none of the sales personnel, with two minor exceptions, were used to sell or promote the sale of private label evaporated milk.

The records of the respondent show that field selling expenses amounting to \$167,174.92 were charged directly to evaporated milk. The remaining unapplied field selling expenses amounted to \$2,404,158.40 and the general sales office expenses amounted to \$317,064.00, or a total of \$2,721,222.40 of unallocated selling expenses. This amount was allocated between Borden Brand evaporated milk and other products on the basis of sales dollars (44.0206%) which resulted in a total selling expense allocated to Borden brand evaporated milk of \$1,364,644.17. The selling cost per case sold was \$.3163.

The cost study presented by the respondent showed that selling expenses incurred in the New York and San Francisco sales offices in the total amount of \$974.95 had been allocated to private label evaporated milk on the basis of an estimate of their selling activities. Examination of correspondence of the sales manager of the San Francisco branch indicates that considerably more of his salary and expenses should be charged to private label milk.

As previously stated the joint product selling expenses were allocated by the respondent between evaporated milk and other products on the basis of the respective sales of the Borden brand products. On that basis 44.0206% of joint selling expenses were allocated to evaporated milk. A computation of the relative gross profit of the evaporated milk sales compared with the sales of other Borden brand products has been made and shows that the evaporated milk sales produced 40.10% of the gross profit of the Borden Food Products Division. On the basis that the gross margin is more indicative of the relative selling effort, the joint selling expenses have been allocated on that basis, resulting in a combined direct and allocated selling cost of \$1,257,994.15, or \$.2916 per case sold.

One of the principal activities of the respondent's field salesmen is the arranging of product displays on the customer's premises. A summary of all displays during the year 1957 by the field salesmen shows that 41.0% of such displays were of evaporated milk, although displays were arranged for five other Borden brand products also. While the Borden field salesmen arrange more displays on evaporated milk than any other product, the proportion appears to be in line with the gross margin of 40.10%. However, in this connection it should be noted that many chain stores which sell Borden products will not allow the respondent's salesmen to set up displays. For that reason, the number of displays cannot be used as the measuring factor of salesmen activities and as the basis for allocating selling expenses.

Brokers' Commissions. - As stated in the respondent's cost report, "brokers performed the function of selling the Division's (Borden Food Products Division) advertised products to wholesalers and chains in those areas where the Division did not have its own jobbing salesmen." The brokers were paid a commission of 5¢ per case on Borden brand evaporated milk. The total brokerage paid in 1957 amounted to \$170,151.48 as shown by the respondent's records. This represented an average of \$.0394 per case of Borden brand evaporated milk sold in that year.

In addition, the respondent paid brokers at the rate of 2½¢ per case on some sales of private label. The respondent has never paid this brokerage on the Cherub brand sold to Safeway. The respondent claims that the brokers do not handle the private label sales, and that this brokerage constitutes, in effect, an additional brokerage on Borden brand. However, as the brokerage is not paid on all private label milk sales and because the amount of the brokerage varied directly with the sales of private label the brokerage is considered here as an additional cost applicable to private label. During 1957 the brokerage on private label amounted to \$13,879.31, or \$.0126 per case.

Promotion Department Expenses. - Mr. A. J. Berry is the respondent's product manager for evaporated milk, both Borden brand and private label. The promotion department expenses include the salaries and expenses of Mr. Berry and his staff and these were allocated by the respondent in its cost study between Borden brand and private label on the basis of the number of cases sold. Included in this allocation were the payments at the rate of 1/2¢ per case to the Evaporated Milk Association.

In addition, certain salaries and expenses in connection with the medical and hospital promotional activities and relating to conventions were charged entirely to Borden brand.

These expenses for 1957 were allocated as follows:

8091

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COMMISSION
5479-N

IN CAMERA

	Borden Brand	Private Label
A. J. Berry and staff salaries and expenses	\$ 32,735.75	\$ 8,381.94
Evaporated Milk Association	20,422.70	5,229.19
Medical promotional salaries & expenses	15,252.15	
Conventions and other expenses	13,336.40	
Total expenses	\$ 81,747.00	\$ 13,611.13
Cost per case sold	\$.0189	\$.0123

Clerical Expenses. - The respondent included in the cost study the clerical expenses of certain service departments located in New York City from which the field production and sales activities were controlled and coordinated. Only the clerical expenses of those departments were included which would show a cost difference between Borden brand and private label evaporated milk.

As the functions of the service departments also related to other products, the respondent regularly prepared analyses, for budget purposes, of the time and effort to arrive at a percentage allocation to each division, including the Food Products Division. These allocations were based upon the estimated time and effort of each employee.

Basically the same percentages were used to allocate clerical expenses of the several departments to Borden brand evaporated milk and to private label. These percentages and allocations were checked with the underlying records. The allocations of clerical expenses of the several departments to Borden brand and to private label evaporated milk are shown by the following tabulation:

IN CASE

Department	Borden Brand	Private Label
Payroll	\$ 3,172.08	\$ -
Tabulating	18,084.20	912.00
Credit	12,938.85	725.19
Cashier	6,166.64	83.66
Cost	1,848.01	3,962.74
Stock sales and commission	2,987.98	50.03
Sales service	10,468.68	1,108.06
Traffic	9,314.53	
Totals	\$ 64,980.97	\$ 6,841.68
Cost per case sold	\$.0151	\$.0062

872

RESPONDENT'S EXHIBIT No. 7

Miss Virginia BRAND

EVAPORATED MILK

VITAMIN D CONTENT INCREASED

DIRECTIONS

By adding one part of water to one part of the contents of this can a resulting milk product will be obtained which will not be below the legal standard for whole milk.

The vitamin D content of Miss Virginia Brand Evaporated Milk has been increased by adding not less than 25 U. S. P. units of vitamin D in the form of activated ergosterol per fluid ounce. This will provide the equivalent of not less than 400 U. S. P. units per quart when mixed with an equal volume of water.

Consult Your Physician About Feeding Formula For Your Child


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Diul...
IN THE
FALL...
ACE REPO...

RESPONDENT'S EXHIBIT No. 9
BORDEN SILVER COW LABELS

TALL 14-1/2 OZ. CAN

Borden's
SILVER COW



SAVE COUPON

EVAPORATED MILK
HOMOGENIZED-VITAMIN D INCREASED

BORDEN RED SCISSORS Coupon



SAVE FOR VALUABLE PREMIUMS

800 PREMIUMS—Visit local Red Scissors Premium Store or send postcard to Red Scissors Coupon Plan, 16 Essex St., Newark 2, N. J., for catalog.

GET PREMIUMS FASTER—Redeem Borden coupons with coupons from LUZIANNE COFFEE & TEA, MRS. FILBERT'S MARGARINE & SALAD PRODUCTS, JOAN OF ARC & PRIDE OF ILLINOIS CANNED VEGETABLES, LIMIT LIQUID STARCH • OCTAGON SOAP & DETERGENTS

Northern States Only
LA ROSA MACARONI PRODUCTS • KIRKMAN SOAP PRODUCTS

Southern States Only
CALUMET BAKING POWDER • JET DUG & CAT FOOD
BONUS DOG FOOD • SKINNER MACARONI PRODUCTS
ARTEX CANNED MEATS


Redeem. No only by consumer to whom originally issued in continental U.S.A. and Alaska. Offer valid in states prohibiting, regulating or taxing premium offers. Cash value 2 mills. This offer expires May 31, 1964.

BORDEN RECIPE

SWISS RABBIT
(Makes 6 to 8 servings)

1 (8 oz.) package Borden's Process Swiss Cheese, shredded • 1 (8 oz.) package Borden's (Sharp) Process Cheese, shredded • 1 cup Borden's Evaporated Milk • 1/2 teaspoon whole oregano, crumbled

Place cheese and evaporated milk in top of double boiler; cook over hot water, stirring occasionally, until cheese melts and mixture is well blended, about 20 minutes. Add oregano. Serve on buttered toast or crackers.



EXCELLENT FOR BABY FEEDING AND ALL MILK USES


Borden's Evaporated Milk is made from fresh whole milk by removing about half the water and adding Vitamin D. It is unsweetened. By adding one part of water to one part of the contents of this can, a resulting milk product will be obtained which will not be below the legal standard for whole milk. For use whenever you need milk and for feeding your baby, there is no better, more nourishing evaporated milk than Borden's. The Vitamin D content of Borden's Evaporated Milk is increased by adding 25 U.S.P. units of Vitamin D₂ per fluid ounce. Each reconstituted quart (half Borden's, half water) provides 400 U.S.P. units of Vitamin D, the minimum daily requirement for infant, child or adult. Your doctor knows Borden's. Ask him to prescribe a Borden formula for your baby.

THE BORDEN COMPANY, NEW YORK 17, N. Y.

NET WT. 14 1/2 OZS. ©1957 THE BORDEN COMPANY LIQ. MEAS. 13 OZS.

SMALL 6 OZ. CAN

Borden's
SILVER COW



SAVE COUPON

EVAPORATED MILK
HOMOGENIZED-VITAMIN D INCREASED

BORDEN RED SCISSORS Coupon



SAVE FOR VALUABLE PREMIUMS

800 PREMIUMS—Visit local Red Scissors Premium Store or send postcard to Red Scissors Coupon Plan, 16 Essex St., Newark 2, N. J., for catalog.

GET PREMIUMS FASTER—Redeem Borden coupons with coupons from LUZIANNE COFFEE & TEA • MRS. FILBERT'S MARGARINE & SALAD PRODUCTS • JOAN OF ARC & PRIDE OF ILLINOIS CANNED VEGETABLES • LIMIT LIQUID STARCH • OCTAGON SOAP & DETERGENTS

Northern States Only
LA ROSA MACARONI PRODUCTS • KIRKMAN SOAP PRODUCTS

Southern States Only
CALUMET BAKING POWDER • JET DUG & CAT FOOD
BONUS DOG FOOD • SKINNER MACARONI PRODUCTS
ARTEX CANNED MEATS


Redeem. No only by consumer to whom originally issued in continental U.S.A. and Alaska. Offer valid in states prohibiting, regulating or taxing premium offers. Cash value 2 mills. This offer expires May 31, 1964.

BORDEN RECIPE

CELERY AND PEA SAUCE (Makes 2 1/2 cups)

1/4 cup Borden's Evaporated Milk • 1/4 cup water • 1 (10 1/2 oz.) can condensed cream of celery soup • 1 cup cooked peas

Blend together evaporated milk, water and soup in small saucepan; add peas. Cook until piping hot.



EXCELLENT FOR BABY FEEDING AND ALL MILK USES

Borden's Evaporated Milk is made from fresh whole milk by removing about half the water and adding Vitamin D. It is unsweetened. By adding one part of water to one part of the contents of this can, a resulting milk product will be obtained which will not be below the legal standard for whole milk. For use whenever you need milk and for feeding your baby, there is no better, more nourishing evaporated milk than Borden's. The Vitamin D content of Borden's Evaporated Milk is increased by adding 25 U.S.P. units of Vitamin D₂ per fluid ounce. Each reconstituted quart (half Borden's, half water) provides 400 U.S.P. units of Vitamin D, the minimum daily requirement for infant, child or adult. Your doctor knows Borden's. Ask him to prescribe a Borden formula for your baby.

THE BORDEN COMPANY, NEW YORK 17, N. Y.


NET WT. 6 OZS. ©1957 THE BORDEN COMPANY LIQ. MEAS. 5 1/2 OZS.

RESPONDENT'S EXHIBIT No. 10

BORDEN GOLDEN COW LABELS

TALL 14-1/2 OZ. CAN

Borden's



EVAPORATED MILK

HOMOGENIZED-VITAMIN D INCREASED

BORDEN **RED SCISSORS COUPON**

SAVE FOR VALUABLE PREMIUMS



800 PREMIUMS—This brand Red Scissors Premium Store or send postcard to Red Scissors Coupon Plan, 830 Mission Street, San Francisco 3, Calif. for catalog.

GET PREMIUMS FASTER—Borden's Evaporated Milk coupons with coupons from AUSTEX CANNED MEATS • DR. ROSS DOG & CAT FOODS • JOAN OF ARC CANNED VEGETABLES • CALUMET BAKING POWDER (Tampa, New Mexico, Arizona only) • LUZIANNE COFFEE (Calif. only) • SKINNER MACARONI PRODUCTS (Tampa, New Mexico)

Redeemable only by consumer to whom originally issued in continental U.S.A. and Alaska. Offer valid in states prohibiting, regulating or taxing premium offers. Cash value 2 cts. This offer expires May 31, 1964.

VOID IN THE STATE OF WASHINGTON

BORDEN RECIPE **TUNA TOMATO BISQUE** (Makes 4 servings)

1 (10½ oz.) can condensed tomato soup • 1 (14½ oz.) can Borden's Evaporated Milk • 1 (7 oz.) can flaked tuna well-drained • 2 tablespoons grated onion

Combine soup and evaporated milk in top of boiler; add tuna fish and onion. Cook over hot water thoroughly heated, about 10 minutes.

EXCELLENT FOR BABY FEEDING AND ALL MILK USES


Borden's Evaporated Milk is made from fresh whole milk by removing about half the water and adding Vitamin D. By adding one part of water to one part of this can, a resulting milk product will be obtained which will be the legal standard for whole milk. For use whenever you need feeding your baby, there is no better, more nourishing evaporated milk than Borden's. The Vitamin D content of Borden's Evaporated Milk is increased by adding units of Vitamin D, per fluid ounce. Each reconstituted quart (half Borden's) provides 400 U.S.P. units of Vitamin D, the minimum daily requirement for an adult. Your doctor knows Borden's. Ask him to prescribe a Borden formula.

THE BORDEN COMPANY, NEW YORK 17, N. Y.

NET WT. 14½ OZ. ©1957 THE BORDEN COMPANY U.S. REG.

SMALL 6 OZ. CAN

Borden's



EVAPORATED MILK

HOMOGENIZED-VITAMIN D INCREASED

BORDEN **RED SCISSORS COUPON**

SAVE FOR VALUABLE PREMIUMS



800 PREMIUMS—This brand Red Scissors Premium Store or send postcard to Red Scissors Coupon Plan, 830 Mission St., San Francisco 3, Calif. for catalog.

GET PREMIUMS FASTER—Borden's Evaporated Milk coupons with coupons from AUSTEX CANNED MEATS • DR. ROSS DOG & CAT FOODS • JOAN OF ARC CANNED VEGETABLES • CALUMET BAKING POWDER (Tampa, New Mexico, Arizona only) • LUZIANNE COFFEE (Calif. only) • SKINNER MACARONI PRODUCTS (Tampa, New Mexico)

Redeemable only by consumer to whom originally issued in continental U.S.A. and Alaska. Offer valid in states prohibiting, regulating or taxing premium offers. Cash value 2 cts. This offer expires May 31, 1964.

VOID IN THE STATE OF WASHINGTON

BORDEN RECIPE **CREAMY SAUCE** (Makes 1½ cups)

2 tablespoons butter • 2 tablespoons flour • dash of salt • dash of dry mustard • 1 cup Borden's Evaporated Milk • ¼ cup water • ¼ teaspoon Worcestershire sauce

Melt butter in small saucepan over low heat; remove from heat. Blend in flour, salt and mustard. Combine evaporated milk and water; gradually stir in flour mixture. Cook over low heat, stirring constantly, until thickened. Add Worcestershire sauce.

EXCELLENT FOR BABY FEEDING AND ALL MILK USES

Borden's Evaporated Milk is made from fresh whole milk by removing about half the water and adding Vitamin D. It is unsweetened. By adding one part of water to one part of this can, a resulting milk product will be obtained which will be the legal standard for whole milk. For use whenever you need milk and for feeding your baby, there is no better, more nourishing evaporated milk than Borden's. The Vitamin D content of Borden's Evaporated Milk is increased by adding 25 U.S.P. units of Vitamin D, per fluid ounce. Each reconstituted quart (half Borden's) provides 400 U.S.P. units of Vitamin D, the minimum daily requirement for an adult. Your doctor knows Borden's. Ask him to prescribe a Borden formula for your baby.

THE BORDEN COMPANY, NEW YORK 17, N. Y.

NET WT. 6 OZ. ©1957 THE BORDEN COMPANY U.S. REG.

RESPONDENT'S EXHIBIT No. 11

BORDEN SILVER COW - PEARL BRAND LABELS

TALL 14-1/2 OZ. CAN

Borden's
SILVER COW-PEARL BRAND



EVAPORATED MILK
HOMOGENIZED-VITAMIN D INCREASED

BORDEN'S **RED SCISSORS** Coupon



SAVE FOR VALUABLE PREMIUMS

SEE PREMIUMS—Visit local Red Scissors Premium Store or send postcard to Red Scissors Coupon Plan, 16 Essex St., Newark 2, N. J., for catalog.

GET PREMIUMS FASTER—Redeem Borden coupons with coupons from LIZARDIE COFFEE & TEA, MRS. FILBERT'S MARGARINE & SALAD PRODUCTS, JOAN OF ARC & PRIDE OF ILLINOIS CANNED VEGETABLES, LINT LIQUID STARCH • OCTAGON SOAP & DETERGENTS

Northern States Only
LA ROSA MACARONI PRODUCTS • KIRKMAN SOAP PRODUCTS

Southern States Only
CALUMET BAKING POWDER • JET DOG & CAT FOOD, BOWNS DOG FOOD • SKINNER MACARONI PRODUCTS, AMSTEX CANNED MEATS


Redeemable only by consumer to whom originally issued in continental U.S.A. and Alaska. Offer void in states prohibiting, suspending or limiting premium offers. Cash value 2 cts. This offer expires May 31, 1964.

BORDEN'S **RED SCISSORS** Coupon

BORDEN'S **CREAMY HASHED POTATOES**
(Makes 4 to 6 servings)

1 tablespoon butter • 1 tablespoon chopped onion • 1 teaspoon salt • 1/4 teaspoon pepper • 4 cups diced, cooked potatoes • 1/2 cup Borden's Evaporated Milk

Melt butter in skillet; add onion; sauté until golden brown. Stir in seasonings; add potatoes and evaporated milk. Cook only until milk is heated.



EXCELLENT FOR BABY FEEDING AND ALL MILK USES

Borden's Evaporated Milk is made from fresh whole milk by removing about half the water and adding Vitamin D. It is unsweetened. By adding one part of water to one part of the contents of this can, a resulting milk product will be obtained which will not be below the legal standard for whole milk. For use whenever you need milk and for feeding your baby, there is no better, more nourishing evaporated milk than Borden's. The Vitamin D content of Borden's Evaporated Milk is increased by adding 25 U.S.P. units of Vitamin D, per fluid ounce. Each reconstituted quart (half Borden's, half water) provides 400 U.S.P. units of Vitamin D, the minimum daily requirement for infant, child or adult. Your doctor knows Borden's. Ask him to prescribe a Borden formula for your baby.

THE BORDEN COMPANY, NEW YORK 17, N. Y.

NET WT. 14 1/2 OZS. ©1957 THE BORDEN COMPANY LQJ. MEAS. 13 OZS.


SMALL 6 OZ. CAN

Borden's
SILVER COW-PEARL BRAND



EVAPORATED MILK
HOMOGENIZED-VITAMIN D INCREASED

BORDEN'S **RED SCISSORS** Coupon



SAVE FOR VALUABLE PREMIUMS

SEE PREMIUMS—Visit local Red Scissors Premium Store or send postcard to Red Scissors Coupon Plan, 16 Essex St., Newark 2, N. J., for catalog.

GET PREMIUMS FASTER—Redeem Borden coupons with coupons from LIZARDIE COFFEE & TEA, MRS. FILBERT'S MARGARINE & SALAD PRODUCTS, JOAN OF ARC & PRIDE OF ILLINOIS CANNED VEGETABLES, LINT LIQUID STARCH • OCTAGON SOAP & DETERGENTS

Northern States Only
LA ROSA MACARONI PRODUCTS • KIRKMAN SOAP PRODUCTS

Southern States Only
CALUMET BAKING POWDER • JET DOG & CAT FOOD, BOWNS DOG FOOD • SKINNER MACARONI PRODUCTS, AMSTEX CANNED MEATS

Redeemable only by consumer to whom originally issued in continental U.S.A. and Alaska. Offer void in states prohibiting, suspending or limiting premium offers. Cash value 2 cts. This offer expires May 31, 1964.

BORDEN'S **RED SCISSORS** Coupon

BORDEN'S **CREAMY SAUCE** (Makes 1 1/2 cups)

2 tablespoons butter • 2 tablespoons flour • dash of salt • dash of dry mustard • 1 cup Borden's Evaporated Milk • 1/2 cup water • 1/4 teaspoon Worcestershire sauce

Melt butter in small saucepan over low heat; remove from heat. Blend in flour, salt and mustard. Cook one cup evaporated milk and water; gradually stir in Borden's sauce. Cook over low heat, stirring constantly, until thickened. Add Worcestershire sauce.

EXCELLENT FOR BABY FEEDING AND ALL MILK USES

Borden's Evaporated Milk is made from fresh whole milk by removing about half the water and adding Vitamin D. It is unsweetened. By adding one part of water to one part of the contents of this can, a resulting milk product will be obtained which will not be below the legal standard for whole milk. For use whenever you need milk and for feeding your baby, there is no better, more nourishing evaporated milk than Borden's. The Vitamin D content of Borden's Evaporated Milk is increased by adding 25 U.S.P. units of Vitamin D, per fluid ounce. Each reconstituted quart (half Borden's, half water) provides 400 U.S.P. units of Vitamin D, the minimum daily requirement for infant, child or adult. Your doctor knows Borden's. Ask him to prescribe a Borden formula for your baby.

THE BORDEN COMPANY, NEW YORK 17, N. Y.

NET WT. 6 OZS. ©1957 THE BORDEN COMPANY LQJ. MEAS. 5 1/2 OZS.

SAFEMAY CHERUB LABELS

TALL 14-1/2 OZ. CAN

Cherub.



EVAPORATED MILK

HOMOGENIZED • VITAMIN D INCREASED

NET WEIGHT
14 1/2 OZ.
EQUIV. 13 OZ.
LIQUID

DISTRIBUTED BY
HANFORD MILK CO.
Head Office:
Oakland, Calif.

Cherub.

EVAPORATED MILK

○ **CHERUB MILK** is unsweetened selected whole cow's milk with at least half the water evaporated. Quality and richness are rigidly controlled (not less than 7.9% butterfat and 25.9% total solids) - approximately twice as rich as ordinary milk.

○ **VITAMIN D** - The Vitamin D content of Cherub Milk has been increased by the addition of 25 U.S.P. units of Vitamin D₂ per fluid ounce. This will provide not less than 400 U.S.P. units per quart when equal volumes of Cherub Milk and water are mixed.

○ **INFANT FEEDING** - Cherub Milk is excellent for infant feeding. It can often be accepted by infants allergic to ordinary milk. Babies supplied additional Vitamin D and Iron from other sources should be done with any of milk. Ask your physician for proper formula for your baby.

○ **COOKING, ETC.** - Cherub Milk is ideal for cooking. Use undiluted in soups, ice cream, cocoa, coffee, or over cereal. In recipes add richness to suit recipe.

○ **FOR DRINKING** - Mix equal parts of Cherub Milk and water or vary to suit taste.

SMALL 6 OZ. CAN

Cherub.



EVAPORATED MILK

HOMOGENIZED • VITAMIN D INCREASED

NET WEIGHT 6 OZ.
EQUIV. 5 1/2 OZ. LIQUID



Distributed by
SAFEMAY STORES, INC.
Head Office:
Oakland, Calif.

Cherub.

EVAPORATED MILK

○ **CHERUB MILK** is unsweetened selected whole cow's milk with at least half the water evaporated. Quality and richness are rigidly controlled (not less than 7.9% butterfat and 25.9% total solids) - approximately twice as rich as ordinary milk.

○ **VITAMIN D** - The Vitamin D content of Cherub Milk has been increased by the addition of 25 U.S.P. units of Vitamin D₂ per fluid ounce. This will provide not less than 400 U.S.P. units per quart when equal volumes of Cherub Milk and water are mixed.

○ **EXCELLENT FOR INFANT FEEDING** ○ **FOR COOKING** ○ **FOR DRINKING**

P-56

B-2-M-A-8 1/4

RESPONDENT'S EXHIBIT No. 13

TOPCO FOOD CLUB LABELS

TALL 14-1/2 OZ. CAN

Vitamin "D" increased

EVAPORATED MILK

Food Club

HOMOGENIZED

NET WEIGHT 14 1/2 OZ.
EQUIV. 13 OZ. LIQUID

Distributed by



U.S.A.

©TOPCO

EVAPORATED MILK

QUALITY FOOD CLUB MILK
Food Club Evaporated Milk is produced in carefully selected plants located in the finest dairy producing areas. Protected herds and the latest scientific processing techniques guarantee you a quality product.

HOMOGENIZED VITAMIN "D" ADDED
Vitamin D content has been increased by the addition of pure crystalline Vitamin D₂ (25 USP units per fluid ounce or 400 USP units per quart when mixed with an equal amount of water.)

UNSWEETENED

FOR COOKING
For better flavor and finer cooking, Food Club Evaporated Milk is homogenized. By adding one part of water to one part of the contents of this can a resulting milk product will be obtained which will not be below the legal standard for whole milk.

FOR BABIES
Food Club is an excellent source of Vitamin "D" for adults, children and infants. Consult your physician for proper formula. Use Food Club for your baby—it's nutritious and pleasant tasting.

MILK FOR BABIES

Food Club

Quality Control

MAINTAINED BY CONSTANT LABORATORY INSPECTION

FC-04011A

SMALL 6 OZ. CAN

Vitamin "D" increased

EVAPORATED MILK

Food Club

HOMOGENIZED

NET WEIGHT 6 OZ.
EQUIV. 5 1/2 OZ. LIQUID

Distributed by



U.S.A.

©TOPCO

EVAPORATED MILK

QUALITY FOOD CLUB MILK
Food Club Evaporated Milk is produced in carefully selected plants located in the finest dairy producing areas. Protected herds and the latest scientific processing techniques guarantee you a quality product.

HOMOGENIZED VITAMIN "D" ADDED
Vitamin D content has been increased by the addition of pure crystalline Vitamin D₂ (25 USP units per fluid ounce or 400 USP units per quart when mixed with an equal amount of water.)

UNSWEETENED

FOR COOKING
For better flavor and finer cooking, Food Club Evaporated Milk is homogenized. By adding one part of water to one part of the contents of this can a resulting milk product will be obtained which will not be below the legal standard for whole milk.

FOR BABIES
Food Club is an excellent source of Vitamin "D" for adults, children and infants. Consult your physician for proper formula. Use Food Club for your baby—it's nutritious and pleasant tasting.

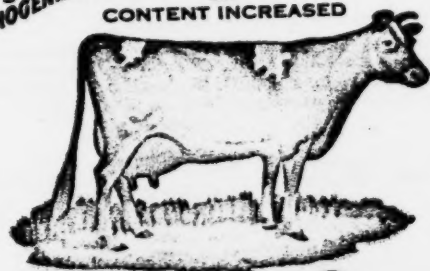
MILK FOR BABIES

Food Club

Quality Control

FC-0400-A

RESPONDENT'S EXHIBIT No. 14

CROG SHURFINE LABELTALL 14-1/2 OZ. CANIT'S
HOMOGENIZED! VITAMIN
D
CONTENT INCREASED

Shurfine

EVAPORATED MILK

NET WEIGHT 14½ OZS.
EQUIV. 13 OZS. LIQUID

This Milk with Vitamin D content increased, is suitable for use in infant formula and child feeding. Consult your Doctor for feeding instructions.

The vitamin D content of Evaporated Milk has been increased by the addition of 25 U.S.P. units of vitamin D per fluid ounce in the form of activated ergosterol. This will produce the equivalent of 400 units per quart when mixed with an equal amount of water.

When this Milk is consumed in the customary amounts, such addition aids in the prevention of Rickets in normal infants, and in the development of sound bones and teeth.

SHURFINE MILK is delicious in coffee, whips easily when chilled, excellent for baking and cooking, and superior for making rich creamy sauces, gravies, soups, icings, etc. In coffee or for whipping, use full strength.

By adding one part of water to one part of the contents of this can a resulting milk product will be obtained which will not be below the legal standard for (whole) milk.

COPYRIGHT 1944

N.R.O.G.

NATIONAL RETAILER-OWNED GROCERS, INC.
DISTRIBUTORS GENERAL OFFICES CHICAGO, ILL.IT'S
HOMOGENIZED! VITAMIN
D
CONTENT INCREASED

Shurfine

EVAPORATED MILK

NET WEIGHT 14½ OZS.
EQUIV. 13 OZS. LIQUIDNATIONAL RETAILER-OWNED GROCERS, INC.
DISTRIBUTORS

NATIONAL LABOR RELATIONS BOARD

Docket No. _____ OFFICIAL EXHIBIT NO. _____

Disposition

Identified _____

Received _____

Rejected _____

In the Matter of _____

Date _____ Witness _____ Reporter _____

Co. Pages _____

FEDERAL TRADE COMMISSION

DOCKET NO. 7179 COMMISSION EXHIBIT NO. 14

IN THE MATTER OF _____

DATE 12/15/51 WITNESS _____

ACE REPORTING CO., Official Reporter

By _____

Shurfine

8139

RESPONDENT'S EXHIBIT No. 15

COMMUNITY CASH SUNNY DAY LABELTALL 14-1/2 OZ. CAN**SUNNY DAY**
**EVAPORATED
MILK**
 HOMOGENIZED VITAMIN D INCREASED

 CONTENTS 14½ OZ. AVOIR.
 LIQUID MEAS. 13 OZ.

The Vitamin D content of Sunny Day Evaporated Milk is increased by adding 25 U.S.P. units of Vitamin D₃ per fluid ounce. This provides 400 U.S.P. units of Vitamin D (the minimum daily requirement for infant, child or adult) per reconstituted quart when equal volumes of this milk and water are mixed. By adding one part of water to one part of the contents of this can, a resulting milk product will be obtained which will not be below the legal standard for whole milk.

 PACKED FOR
 COMMUNITY CASH
 STORES
 SPARTANBURG, S. C.

**SUNNY DAY
EVAPORATED
MILK**

HOMOGENIZED · VITAMIN D INCREASED

Sunny Day Evaporated Milk is made from fine quality, fresh cows' milk under the most rigid sanitary conditions. There is no safer, more uniform, more economical form of milk.

DIRECTIONS

FOR INFANT FEEDING—Sunny Day Evaporated Milk is excellent for babies. Consult your physician for proper formula for your baby.

When your healthy, strong baby has outgrown bottle feedings, keep right on using thrifty Sunny Day Evaporated Milk for cup feedings, on cereals and fruit and in all cooking where the recipe calls for milk.

FOR COOKING AND BAKING—For use whenever you need milk, simply mix Sunny Day Evaporated Milk with an equal amount of water and use as you would fresh, whole milk. By using less water, you can increase the creaminess and smoothness of your cooking.

FOR COFFEE AND BEVERAGES—To bring out the flavor of your favorite coffee or other beverage, pour in creamy Sunny Day Evaporated Milk just as it comes from the can. Also, many people use it full strength in place of cream on cereals and fruit.

NATIONAL LABOR RELATIONS BOARD

No. _____ OFFICIAL EXHIBIT NO. _____

Disposition

Identified _____

Recorded _____

Excluded _____

Attorney for _____

Witness _____

Reporter _____

FEDERAL TRADE COMMISSION

DOCKET NO. 7129 COMMISSION EXHIBIT NO. 15

IN THE MATTER OF _____

DATE 12/1/64 WITNESS _____

ACE REPORTING CO., Official Reporter

By _____

125

8140

LOCATION OF PLANTS PACKING EVAPORATED MILK
(Case goods only)

Evaporated Milk Association
February 1, 1956

Plants which concentrate milk for shipment to canning plants for reprocessing are designated by "C" - Receiving stations are designated by "R".

ALABAMA

Carnation Co.
Dadeville - C
Decatur - R

ARKANSAS

Carnation Co.
Harrison - R
Rogers - R

Pet Milk Co.
Huntsville - R
Paris - R
Siloam Springs

CALIFORNIA

Borden Co.
Modesto

Carnation Co.
Anderson - R
Chico - C
Dos Palos - R
Gustine
Maxwell - R
Stockton - R
Turlock - R

Danish Creamery Association
Chowchilla

CALIFORNIA - (Cont'd)

Golden State Co., Ltd.
(Foremost Dairies, Inc.)
Newman

Lucerne Milk Co.
Hanford

Meyenberg Milk Products Co.
Ripon

Nestle Co.
Ripon

Sego Milk Products Co.
(Pet Milk Co.)

Galt
Orland
Salinas

COLORADO

Colorado Condensed Milk Co.
(Carnation Co.)
Johnstown

GEORGIA

Borden Co.
Royston - R

FEDERAL TRADE COMMISSION

ACCOUNT NO. 712, 9 COMMISSION
RESPONDENT EXHIBIT NO. 16-1

Carnation Co.
Nampa

Sego Milk Products Co.
(Pet Milk Co.)

Buhl
Burley - R
Downey - R
Preston - R
St. Charles - R

ILLINOIS

Amboy Milk Products Co.
Amboy

Borden Co.
Dixon
Sterling - R

Carnation Co.
Morrison
Oregon

Dean Milk Co.
Pecatonica

Edwardsville Creamery Co.
Edwardsville

Litchfield Creamery Co.
Litchfield

Nashville Milk Co.
Nashville

Pet Milk Co.
Carlyle - R
Greenville
Nokomis - R

INDIANA

Kroger Co.
Marion

Litchfield Creamery Co.
Warsaw

Pet Milk Co.
Angola - R
Garrett - R

IOWA

Carnation Co.
Castalia - R
Hazleton - R
Waverly

Fort Dodge Creamery Co.
Fort Dodge

KANSAS

Borden Co.
Fort Scott

Carnation Co.
Girard - R

Page Milk Co.
Coffeyville

Pet Milk Co.
Iola

KENTUCKY

Borden Co.
Hopkinsville - R
Fredonia - R

Carnation Co.
Campbellsville - C
Danville - R
Glasgow - R
Maysville
Mt. Sterling - R
Somerset - R

RESPONDENT'S EXHIBIT No. 16-3

KENTUCKY - (Cont'd)

Pet Milk Co.
Bowling Green
Franklin - R
Mayfield

MARYLAND

Carnation Co.
Oakland - R

Pet Milk Co.
Greensboro

MICHIGAN

Borden Co.
Merrill - R
Mt. Pleasant - C
Perrinton

Carnation Co.
Barryton - R
Hesperia - R
Jamestown - R
Sheridan
Sparta

Nestle Co.
Ubyl

Pet Milk Co.
Charlotte - R
Homer - R
Hudson

White House Milk Co.
Stephenson - C

MINNESOTA

Northfield Milk Products Co.
(Carnation Co.)

MISSISSIPPI

Borden Co.
Starkville - C

Carnation Co.
Baldwyn - R
Tupelo

Pet Milk Co.
Kosciusko
Philadelphia - R
Winona - R

MISSOURI

Borden Co.
Jasper - R.

Carnation Co.
Ava - C
El Dorado Springs - R
Mount Vernon
Neosho - R
Seymour - R

Pet Milk Co.
Carthage - R
Cassville - R
Neosho

Producers Creamery Co.
Cabool

NEW YORK

Mohawk Milk Products Co.
(Carnation Co.)
South Dayton

NORTH CAROLINA

Carnation Co.
Albemarle - R

RESPONDENT'S EXHIBIT No. 16-4

Carnation Co.
 Bellville - R
 Coshocton
 Hillsboro - R
 Mohicanville - R
 Rushville - R

Defiance Milk Products Co.
 Defiance
 Montpelier - R

Nestle Co.
 Crestline - R
 Greenville
 Marysville - C

Pet Milk Co.
 Bryan
 Coldwater
 Delta
 Fremont - R
 Holgate - R

United Dairy Co.
 Athens - R
 Barnesville
 Lodi
 Waterford

Westerville Creamery Co.
 Belle Center - R
 Covington

Borden Co.
 Elkland - R
 Wellsboro

Carnation Co.
 Cambridge Springs
 Corry - R

SOUTH CAROLINA

Borden Co.
 Anderson - R
 Chester
 Newberry - R

TENNESSEE

Borden Co.
 Columbia - R.
 Lewisburg

Carnation Co.
 Bell Buckle - R
 Manchester - R
 Murfreesboro
 Sparta - R
 Watertown - R

Pet Milk Co.
 Athens - R
 Greeneville
 Jonesboro - R
 Martin - R
 Morristown - R
 Newport - R
 Paris - R
 Springfield - R
 Surgoinsville - R
 Trenton - R

OKLAHOMA

Page Milk Co.
 Vinita - R

OREGON

Borden Co.
 Albany

Carnation Co.
 Ontario - R

TEXAS

Carnation Co.
 Sulphur Springs

UTAH

Morning Milk Co.
(Carnation Co.)
Wellsville

Sego Milk Products Co.
(Pet Milk Co.)
Hyrum - R
Richmond
Tremonton - R

VIRGINIA

Carnation Co.
Galax
Riner - R
Stuart - R

Pet Milk Co.
Abingdon
Rural Retreat - R

WASHINGTON

Carnation Co.
Ferndale - R
Mount Vernon
Sunnyside

Northwest Darigold
(Consolidated Dairy Prod. Co.)
Mount Vernon

WEST VIRGINIA

Carnation Co.
Cameron - R
Clarksburg
Huttonsville - R

WISCONSIN

WISCONSIN - (Cont'd)

Armour and Co.
Bloomer
Downing - R
Milton Junction - R
Stoughton

Borden Co.
Amherst - R New London

Carnation Co.
Gratiot - R
Hillsboro - R
Richland Center
Waupun

Consolidated Badger Cooperative
Iola - R Wittenberg - R
Shawano

Dairyland Cooperative Assn.
Juneau Watertown - R

Evangeline Milk Co.
Casco - R Sturgeon Bay

Gehl's Guernsey Farms
Allenton - R Germantown

Page Milk Co.
Merrill

Pet Milk Co.
Dodgeville - R
Evansville - R
Footville
New Glarus
Platteville - R
Shullsburg - R

United Milk Products Co.
Osseo

White House Milk Co.
Abbottsford - R

RESPONDENT'S EXHIBIT No. 17

Private Label Evaporated Milk
Business Lost by The Borden Company,
January 1, 1956 - March 31, 1958

<u>Customer</u>	<u>Shipments for</u>	<u>Date of Last Sale</u>
Way Stores	Safeway Stores El Paso, Texas	June 26, 1956
Associates	Klein's Supermarket St. Paul, Minnesota	Nov. 23, 1956
Associates	Schultz & Co. Sheboygan, Wisconsin	Mar. 11, 1957
Associates	Plumbs Supermarket Muskegon, Michigan	Mar. 14, 1957
Associates	Meijers Supermarket Grand Rapids, Mich.	Oct. 8, 1957
Associates	Big Bear Stores Columbus, Ohio	Sept. 13, 1957
Associates	Pick N' Pay Supermarkets Cleveland, Ohio	Aug. 13, 1957
General Purchasing Co.	Springfield Sugar & Produce Co. Springfield, Mass.	July 16, 1957

FEDERAL TRADE COMMISSION
DUCKET NO. 7129 RESPONDENT EXHIBIT NO. 17
IN THE MATTER OF *Borden Company*
DATE *12/7/59* WITNESS *Berry*
ACE REPORTING CO., Official Reporter

CONFIDENTIAL

THE BORDEN COMPANY

886

RESPONDENT'S EXHIBIT No. 76-A

REVIEW OF RECORDS IN CONNECTION WITH
COMPLAINT ISSUED BY THE FEDERAL TRADE COMMISSION
(DOCKET 7129) PERTAINING TO PRODUCTION,
DISTRIBUTION, AND SALE OF EVAPORATED MILK

FEDERAL TRADE COMMISSION
DOCKET NO. 7129 ~~RESPONDENT EXHIBIT NO. 76~~

IN THE MATTER OF *Borden Co.*

DATE *11-1-63* WITNESS *Borden Co.*

AGE REPORTING CO., Official Reporter

By *[Signature]*

11-1-63
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RESPONDENT'S EXHIBIT No. 76-B

TABLE OF CONTENTS

	<u>Page</u>
Text:	
Introduction.....	1
Production Methods.....	2
Distribution and Marketing Methods:	
Borden Brand.....	3
Private Label.....	5
Accounting System.....	6
Findings and Conclusions.....	7
	<u>Schedule</u>
Schedules:	
Gross Sales.....	1
Damaged Goods.....	2
Cash Discounts Offered.....	3
Labels and Cartons.....	4
Primary Freight.....	5
Secondary Freight.....	6
Reserve Storage.....	7
Consignment Storage.....	8
Investment in Accounts Receivable and	
Inventory.....	9
Premium Label Redemption.....	10
Advertising.....	11
Sales Department.....	12
Brokers' Commissions.....	13
Evaporated Milk Promotion Department...	14
Clerical.....	15

HASKINS & SELLS

CERTIFIED PUBLIC ACCOUNTANTS

TWO BROADWAY
NEW YORK 4

CONFIDENTIAL

December 4, 1959

The Borden Company,

350 Madison Avenue,

New York 17, New York.

Dear Sirs:

In connection with a complaint issued against you by the Federal Trade Commission (Docket 7129), at your request we have reviewed your records pertaining to the production, distribution, and sale of Borden brand evaporated milk and private label evaporated milk (except Government and export business) in order to determine the difference between the prices received by you for each of these products and the differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which those products were sold or delivered.

We understand that the complaint covers the period from the beginning of 1956 through March 1958. We directed our review to the calendar year 1957. We used a full year rather than some shorter period because some aspects of your evaporated milk operations and related costs (e.g., freight and reserve storage) have significant seasonal patterns, and therefore an analysis of any period shorter than a year would not be representative of your actual costs. We chose a calendar year since that was the fiscal year on which your accounting system and operating and expense budgets were based and, under your usual accounting procedures, such data as is available on a monthly basis is not determined as precisely as at the

beginning of 1957 rather than 1956 for the following reasons:

year-end. We chose 1957 rather than 1956 for the following reasons:

in 1957 than in 1956; (b) the difference between the prices for Borden brand and private label was smaller in 1956 than in 1957, and a limited investigation indicated that the costs had not changed substantially from 1956 to 1957, and (c) the underlying records and data were more readily available.

Our present review of the accounting and other records relating to your evaporated milk business has been made under the direct supervision of our Mr. Edward M. Darcey, who has supervised our annual audits of your Company since 1953. Information and explanations herein regarding production and operating methods, as distinguished from information and explanations derived from or directly pertaining to your accounting system and records, have been furnished to us by various of your employees including, in particular, Mr. A. J. Berry, your Food Products Division's Product Manager for evaporated milk.

In 1957 evaporated milk was produced by and marketed through your Food Products Division. We have summarized below the principal features of the Division's evaporated milk production and marketing methods and of your accounting system as it related to evaporated milk which were taken into account by us for purposes of this study.

PRODUCTION METHODS

In 1957 evaporated milk was produced at plants at Albany, Oregon; Chester, South Carolina; Dixon, Illinois; Fort Scott, Kansas; Lewisburg, Tennessee; Modesto, California; New London, Wisconsin; Perrinton, Michigan; and Wellsboro, Pennsylvania. Each plant packed private label as well as Borden brand evaporated milk. The methods of processing and packing evaporated milk did not distinguish among brands. Up to the point where labels were

affixed to the filled, sealed cans, there was no brand identification. While the methods of affixing labels and packing cans in cartons did not differ as between Borden brand and private label, an extra operation was required to stencil a customer identification on some of the private label cartons.

Borden brand evaporated milk was packed in four sizes, "confectioner's" (6 8-pound cans per case), "tall 48" (48 14-1/2 ounce cans per case), "small 48" (48 6-ounce cans per case), and "small 96" (96 6-ounce cans per case). Private label was packed only in "tall 48" and "small 48" sizes. The only size packed by all plants was the "tall 48" size, which was sold in far larger quantities than the other sizes. (Consistently with your usual practice, we have converted all data to the standard unit of 48 tall size cans. One case of 6 confectioner's size cans, one case of 96 small size cans, and 2 cases of 48 small size cans have each been treated as the equivalent of one case of 48 tall size cans; all references to "cases" in this report, unless otherwise specified, include such sizes in terms of their equivalent to tall 48's.)

Borden brand was packed in printed cartons bearing the Borden name; private label was packed either in printed cartons bearing some private label identification or in plain cartons on which a private label identification was stenciled.

DISTRIBUTION AND MARKETING METHODS - BORDEN BRAND

In 1957 Borden brand evaporated milk was sold in various states across the country, and on a uniform delivered price basis. Substantial inventories of Borden brand evaporated milk were carried at three types of storage facility: (1) at the plants which produced evaporated milk; (2) during most of the year, at about 15 reserve warehouses between the plants and the places where it was expected that the evaporated milk would be sold; and (3) at about 100 local consignment warehouses.

RESPONDENT'S EXHIBIT No. 76-4

warehouses direct to customers and also to consignment warehouses. Orders for less than carload quantities were generally filled from the consignment warehouses.

The price, on a carload basis, was \$6.30 per case from the beginning of 1957 until March 29, \$6.45 per case until November 18, and \$6.60 per case during the remainder of the year. The less than carload price was \$.05 higher. All customers were offered a 2% cash discount for payment within ten days. Retailer customers were offered a 1/10 of 1% "swell allowance" in lieu of credits for or replacement of goods found to be in unsaleable condition.

Orders for Borden brand evaporated milk were solicited by brokers and, in some of the larger cities, by your own jobbing salesmen. Both brokers and jobbing salesmen handled, in addition to Borden brand evaporated milk, all of the other Borden brand grocery products manufactured by and sold through your Food Products Division (these included, among others, Starlac, Eagle brand condensed milk, and Instant Coffee). Orders for delivery of Borden brand evaporated milk direct from a factory or a reserve warehouse were generally forwarded to the New York office of the Food Products Division, which in turn forwarded them to the appropriate shipping point, while orders for delivery from a consignment warehouse were processed in the field.

Your Food Products Division maintained a staff of field representatives whose primary duty was to call upon retailers to assist them in promoting sales of its products to consumers. The field representatives operated in all areas, regardless of whether orders were solicited by brokers or by your own jobbing salesmen. The work of the field representatives included such things as arranging displays and display space and, as to Borden brand evaporated milk, reviewing code-datings to insure proper rotation of stocks.

The field representatives were furnished sales promotion material aimed at (1) directing consumer attention to Borden brand products and (2) encouraging the retailer to devote additional or special efforts to promoting the sale of Borden brand products. While the field representatives were responsible for the promotion of all products, they devoted especial attention to Borden brand evaporated milk, the leading product of the Division's line.

Advertising of the Borden name and of Borden brand products was carried on both through a budget administered at the Company level ("all Borden" advertising) and, as to the particular products of the Food Products Division, through budgets for each product administered at the divisional level. Also, the Borden brand evaporated milk bore coupons which were redeemable for merchandise.

DISTRIBUTION AND MARKETING METHODS - PRIVATE LABEL

Private label evaporated milk was sold only from the plants, and inventories were maintained only at the plants. Orders were generally sent by the customers directly to the New York office of the Food Products Division, which forwarded them to the appropriate plant.

The price was f.o.b. plant and was determined each month for each plant.

The Company did not advertise the private label evaporated milk it packed. The merchandise bore no reference to the Borden name, in any form, and your customers were not permitted to use the Borden name in any way in connection with their distribution or sale of the product. The brokers, salesmen and field representatives had no responsibility for, and performed no services in connection with, the promotion or sale of private label evaporated milk.

The general accounting records of your Food Products Division were maintained in New York. The accounting department processed and recorded information based on reports from the plants, brokers, sales offices, reserve warehouses, etc., and from the centralized payroll, tabulating, cost, and similar service departments at your New York office.

The accounting system produced reports and data that were intended to inform and assist management in the conduct of the Division's business. To a considerable extent expenses were accumulated separately for each product, separately for government, for export, and for domestic business, and separately for Borden brand and for private label business.

In general, we have relied upon the information produced by your accounting system. We have done this, however, only after satisfying ourselves, on the basis of such auditing tests as we considered appropriate, as to the reliability of such information. All references in this report to your accounting records and practices refer (unless otherwise specified) to accounts kept and determinations made by you in the usual course of business.

In those instances where the data accumulated by your accounting system in the usual course was not broken down in sufficient detail for our present purposes, and in a few other instances where we deemed it appropriate, we have made special analyses and reviews of underlying data. The extent to which we have made and relied upon such special analyses and reviews is stated in the attached schedules which have brief explanations of our work with respect to the various individual items.

FINDINGS AND CONCLUSION

As to some of the operations involved in your manufacture and distribution of Borden brand and of private label evaporated milk, we concluded that there were no differences between the methods used for Borden brand and those used for private label. These operations included, for example, the labor involved in the processing and packing operations (except for stencilling of some private label cartons) and the administrative activities of the general management of the Company.

There were some operations as to which it appeared that, although there may have been differences between the methods used for Borden brand and those used for private label, such differences in methods would seem to result in negligible cost differences. This category includes, for example, some of the service functions carried on at your New York office to support your sales force. Another example is bad debt losses, which were not suffered at all as to private label evaporated milk, and which were quite small as to advertised products. We made no findings as to cost differences, if any, in these areas.

As pointed out at the end of Schedule 8, it appeared that the cost of storing evaporated milk at the manufacturing plants was higher, per case sold, for Borden brand than for private label but it was not practicable for us to determine the amount of such difference.

The following tabulation shows our findings as to the sales of Borden brand and private label evaporated milk for the calendar year 1957 and the related costs pertaining to operations as to which we found cost differences resulting from the differing methods or quantities in which those products were manufactured, sold or delivered.

RESPONDENT'S EXHIBIT No. 76-8

1	Gross sales.....	\$27,632,192.80	\$6.4046	\$5,716,001.48	\$5.1743
	Less sales deductions:				
	Damaged goods....	48,217.85	.0112	3,002.97	.0027
3	Cash discount offered.....	552,156.41	.1279	-	-
	Net sales.....	\$27,031,818.54	\$6.2655	\$5,712,998.51	\$5.1716
	Costs:				
4	Labels and cartons.....	\$ 771,693.75	\$.1789	\$ 152,059.38	\$.1376
5	Primary freight.	1,589,276.74	.3684	20,754.72	.0188
6	Secondary freight.....	48,516.22	.0112	-	-
7	Reserve storage.	297,565.12	.0690	-	-
8	Consignment storage.....	131,774.39	.0305	-	-
9	Investment:				
	In accounts receivable..	59,247.82	.0137	34,396.86	.0311
	In inventories	360,279.44	.0835	28,421.83	.0257
10	Premium label redemption....	999,122.67	.2316	-	-
11	Advertising.....	539,273.12	.1250	-	-
12	Sales department	1,364,644.17	.3163	974.95	.0009
13	Brokers' commissions.....	184,030.79	.0427	-	-
14	Evaporated milk promotion department....	81,747.00	.0189	13,611.13	.0123
15	Clerical.....	64,980.97	.0151	6,886.16	.0062
	Total.....	\$ 6,492,152.20	\$1.5048	\$ 257,105.03	\$.2327

- (1) Based on 1957 sales of 4,314,410.72 cases
 (2) Based on 1957 sales of 1,104,697.00 cases

Summary

Average Net Sales Prices Per Case	Costs Per Case
Borden brand..... \$6.2655	Borden brand..... \$1.5048
Private label..... 5.1716	Private label..... .2327
Difference..... \$1.0939	Difference..... \$1.2721
Excess of cost difference over price difference:	\$.1782

- 8 -
 (Revised May 6, 1960)

141

We have set out in Schedules 1 to 15, inclusive, attached hereto, the components of the foregoing price and cost data, and a brief explanation of the sources which we used in our determinations of prices and costs.

Yours truly,

Fixtures & Mills

Borden brand. We accumulated the Borden brand sales data from the regular monthly sales tabulations. The totals are as follows:

	Cases Sold	Cases Sold
		Tall 48 Basis
Tall 48's.....	3,944,033.39	3,944,033.39
Small 48's.....	565,595	282,797.50
Small 96's.....	77,055	77,055.00
Confectioner's.....	10,524.83	10,524.83
Total case sales.....		4,314,410.72
Dollar sales.....		\$27,632,192.80
Average price per case.....		\$6.4046

Private label. We accumulated the private label sales data directly from the invoices and settlement sheets covering those sales. The totals are as follows:

	Cases Sold	Cases Sold
		Tall 48 Basis
Tall 48's.....	1,052,553	1,052,553.00
Small 48's.....	104,288	52,144.00
Total case sales.....		1,104,697.00
Dollar sales.....		\$5,716,001.48
Average price per case.....		\$5.1743

SCHEDULE 1

8242

143

DAMAGED GOODS

Borden brand. The Division generally replaced or allowed credit for incidental spoiled or damaged Borden brand evaporated milk. Some customers, however, took the "swell allowance" of one-tenth of one per cent which was offered to retailer customers in lieu of replacement or credits for damaged goods. All of these amounts, and also payments to warehousemen for repacking cartons where a few cans had spoiled, and other costs relating to damaged goods, were recorded in the Division's Damaged Goods account. Any amounts considered to be recoverable from carriers were credited to the account. We accumulated the aggregate net amount from the regular monthly tabulations. The amounts are \$48,217.85, or \$.0112 per case sold.

Private label. The Division did not replace or allow credit for incidental spoiled or damaged private label evaporated milk and it did not incur any other miscellaneous costs in this respect, except for some one-tenth of one per cent "swell allowances" which we accumulated directly from the sales invoices. The total amount is \$3,002.97, or \$.0027 per case sold.

Cash Discounts Offered
Schedule 3

899

RESPONDENT'S EXHIBIT No. 76-12

Borden brand. The Division offered a cash discount of 2% to Borden brand customers for payment within ten days of the invoice date. The discount was available to all customers and almost all customers took it. We considered that a customer who failed to take the discount was paying an extra charge for extension of credit beyond the discount period. Accordingly we have treated the full amount offered as a reduction of the sales price.

The computation is as follows:

Gross sales (from Schedule 1).....	\$27,632,192.80
Add stop-off charges billed to customers (from Schedule 5).....	3,263.40
Total.....	27,635,456.20
Less swell allowances.....	27,635.46*
Net - cash discount base.....	\$27,607,820.74
Cash discounts offered, at 2%.....	\$552,156.41
Discounts offered, per case sold.	<u>\$1.1279</u>

Private label. Cash discounts were not offered to or taken by private label customers.

* Since it was not feasible to isolate swell allowances from the other components of the Division's Damaged Goods account, this amount was estimated to be one-tenth of one per cent of all sales. Since not all customers took the swell allowance, this overstates the actual swell allowance taken. To that extent the cash discount base, and consequently cash discounts offered, are understated.

SCHEDULE 3

8244

145

LABELS AND CARTONS

Aside from the cost differences between Borden brand labels and cartons and private brand labels and cartons attributable to differences in source of supply, quantities ordered, specifications, etc., further differences arose because some private label customers provided their own labels and cartons and because some private label brands were packed in plain (unprinted) cartons on which a customer identification had to be stenciled at the plant.

We summarized the cost of the labels and cartons used in production, by size, for Borden brand and for each private label brand, from the monthly reports of material usage which were submitted by the plants and which were valued by the Division's cost department.*

We obtained the cost of stenciling plain cartons with a private label customer identification from a summary of plant payroll reports.**

In order to relate the data to the sales which were made during 1957, further steps were required to exclude the effect of changes in inventories during the year. The procedures were somewhat different for Borden brand and for private label.

* The plant at Dixon did not report separately usage or costs of Borden brand and Safeway brand labels and cartons. Therefore the quantities of each brand packed were taken from separate correspondence with Dixon. We allocated the costs of labels and cartons between the two brands based upon the relationship of unit costs of the brands at Fort Scott, which was the nearest plant that packed both Borden brand and Safeway brand.

**Since the plant at Albany did not report this item separately, we estimated stenciling costs for the brands packed in plain cartons at Albany at the average per case stenciling cost for all other plants.

RESPONDENT'S EXHIBIT No. 76-14

cartons used in production during the year, separately for each size, at all plants together, and divided the total costs by the number of cases of each size packed (as determined by an analysis of the quantity of cartons and labels used in production), to determine the average cost per case packed. We then multiplied the resulting unit costs by the number of cases of each size sold during the year, to determine the costs applicable to 1957 sales. The final computations are as follows:

	<u>48 Tall</u>	<u>48 Small</u>	<u>96 Small Confectioner's Total</u>
Costs of 1957 production:			
Labels.....	\$303,893.32	\$24,764.45	\$ 5,851.77
Cartons.....	378,162.06	36,722.09	5,761.33
			2,311.13
			422,956.61
Total costs	\$682,055.38	\$61,486.54	\$11,613.10
Cases packed...	3,877,198	556,426	71,893
			11,212
Average cost per case packed (total costs ÷ cases packed).....	.17591	.11050	.16153
			.28066
Cases sold.....	3,944,033.39	565,595	77,055
			10,524.83
Total cost applicable to 1957 sales (average cost x cases sold)	\$693,794.91	\$62,498.25	\$12,446.69
			\$2,953.90
			<u>\$771,693.75</u>
Cost per case sold (tall size equivalent basis)...			<u>\$.1789</u>

Private label. Since label and carton costs varied considerably among brands, we considered it necessary to relate the costs of each brand directly to the sales of each brand. Therefore, we accumulated the costs of labels and cartons used in production during the year separately for each size, brand, and plant, and divided the

SCHEDULE 4

- 2 -

E245

147

RESPONDENT'S EXHIBIT No. 76-15

costs by the number of cases of each type which were packed (as determined by an analysis of the quantity of labels and cartons used in production) to determine the average costs. We then accumulated the number of cases of private labels sold during the year, by size, brand, and plant, from the invoices and settlement sheets, and multiplied those quantities by the appropriate unit costs. The aggregate data are as follows:

	<u>48 Tall</u>	<u>48 Small</u>	<u>Total</u>
Total costs of 1957 production (all plants and brands together):			
Labels.....	\$ 44,036.93	\$1,963.59	\$ 46,000.52
Cartons.....	100,489.40	4,236.93	104,726.33
Stenciling.....	5,061.41	463.22	5,524.63
Total costs.....	\$149,587.74	\$6,663.74	\$156,251.48
Total cases packed.....	1,071,359	110,652	-
Total cases sold.....	1,052,553	104,288	-
Total cost applicable to 1957 sales.....	\$145,909.64	\$6,149.74	\$152,059.38
Cost per case sold (tall size equivalent basis).....			<u>\$.1376</u>

Primary Freight
Schedule 5

903

RESPONDENT'S EXHIBIT No. 76-16

Borden brand. Primary freight on Borden brand consisted of:

(1) the cost of shipment from plants to (a) customers, (b) reserve warehouses, (c) consignment warehouses, and (d) other Borden plants; and

(2) the cost of shipment from reserve warehouses to (a) customers and (b) consignment warehouses.

While the Division accumulated its primary freight costs separately for Borden brand and for private label evaporated milk, we found that these accounts had not been kept on an entirely consistent basis throughout the year. For this reason, we accumulated the primary freight cost data from underlying records.

The net primary freight cost on Borden brand evaporated milk is determined as follows:

(See following page)

SCHEDULE 5

- 1 -

8218

149

Payments to carriers applicable to 1957

Shipments: \$1,416,964.22
 Shipments from plants..... \$1,578,741.28
 Shipments from reserve warehouses..... 161,777.06
 Add - freight on 1956 shipments to warehouses and to
 other plants, where shipments to customers were not
 made until 1957*..... 91,313.48
 Deduct - freight on 1957 shipments to warehouses and
 to other plants, where shipments to customers were
 not made until 1958*..... (72,004.75)
 Amount applicable to 1957 sales..... 1,598,050.01

Less:

Charged to customers on stop-off
 shipments..... 3,263.40
 Claims, etc..... 5,509.87

Net cost..... \$1,589,276.74
 Cost per case sold..... \$.3684

* These amounts are calculated as follows:

January 1 Inventory
 December 31 Inventory

Consignment warehouses (\$.35362, the average
 cost per case of shipments to consignment
 warehouses during 1957, times 128,368 cases
 on hand at January 1, and 106,450 cases on
 hand at December 31)..... \$45,393.49 \$37,642.85
 Reserve warehouses (the aggregate total of
 the number of cases in each warehouse times
 the average cost of shipments to each ware-
 house in 1957)..... 45,674.73 33,451.31
 Small at plants not producing smalls, which
 had been shipped from another plant (the
 aggregate number of cases at each plant
 times the prevailing freight rates per case
 from plants shipping the smalls)..... 245.26 910.59
 Total..... \$91,313.48 \$72,004.75

shipped to consignment warehouses or to reserve warehouses; since

private label was sold on an f.o.b. plant basis, each customer was obligated to reimburse the Division for the freight on shipments to it. There were, however, instances in which private label was shipped to a customer from a plant other than the one from which he ordinarily purchased, with the Division absorbing the difference in freight.

Also, in those instances where the plant from which a customer ordinarily purchased did not manufacture the small size cans, such cans had to be shipped from another (and usually more distant) plant, and the Division was not in all instances fully reimbursed by the customers for the cost of these shipments. Accordingly, we made a detailed analysis of all private label primary freight charges which were paid in the first instance by the Division, deducted the amounts of the reimbursements received by the Division from customers, and charged the difference as the primary freight cost applicable to private label.

The net primary freight cost on private label evaporated milk is computed as follows:

Payments to carriers in 1957 - shipments from plants.....	\$242,075.94
Add freight on 1957 shipments to customers, paid to carriers in 1958.....	795.45
Deduct freight on 1956 shipments to customers, paid to carriers in 1957.....	(533.68)
	<u>242,337.71</u>
Add freight on 1956 shipments applicable to 1957 shipments where shipments to customers were not made until 1957*	30.82
Deduct freight on 1957 shipments of smalls to other plants, where shipments to customers were not made until 1958*.....	(565.18)
	<u>241,803.35</u>
Less - charged to customers.....	221,048.63
Net cost.....	<u>\$ 20,754.72</u>
Cost per case sold.....	<u>\$.0188</u>

* These amounts represent freight on smalls at plants not producing smalls, and are calculated in the same manner as for the comparable Borden brand item shown in the footnote on the preceding page.

SECONDARY FREIGHT

Secondary freight consisted of the costs incurred by the Division in shipping its Borden brand products from consignment warehouses and the West Street warehouse in New York City to customers. No private label evaporated milk went through the consignment warehouses or the West Street warehouse, and accordingly there were no secondary freight costs on private label.

The Division did not distinguish in its accounts between the secondary freight cost on evaporated milk and the cost incurred on other products.

There were well over 10,000 freight bills covering shipments from these warehouses during the year and many of the invoices included more than one product. It would have been an extremely laborious process to determine the secondary freight cost on Borden brand evaporated milk by computing the freight charges shown on each invoice. Therefore we determined the secondary freight costs on a random sample of the secondary freight bills and assumed that the remaining freight bills would show comparable costs. The sample included 18.775% of the total number of available freight bills, and showed a total of \$9,108.92 of charges to evaporated milk. Accordingly, we multiplied this amount by 100/18.775 to arrive at the total evaporated milk secondary freight cost. This amount is \$48,516.22, or \$.0112 per case sold.

During most of the year, the Division stored substantial quantities of Borden brand evaporated milk in about 15 reserve warehouses. These warehouses were located in or near regions where there was a substantial demand for Borden brand evaporated milk. Shipments were made from these warehouses in carload lots to customers and to consignment warehouses. Private label evaporated milk was not stored in reserve warehouses.

Most of these warehouses were owned and operated by independent warehousemen. The Division, however, maintained a reserve warehouse at Elkland, Pennsylvania, and also used its Macon, Mississippi, facility for the same purpose.

We accumulated the total charges from the monthly summaries prepared by the Division. We then added to this amount the storage charges which had been paid in 1956 but which applied to 1957 sales, and subtracted the charges paid in 1957 but which related to 1958 sales. The computations are as follows:

Commercial warehouse charges (summary of actual invoice charges during year).....	\$227,241.04
Expenses at Elkland (actual expenses for the year - labor, utilities, depreciation, taxes, etc.).....	21,019.97
Expenses at Macon (based on rates which were charged by commercial warehouses in the area; used in lieu of higher actual expenses which included idle plant costs).	13,507.68
1956 payments applicable to 1957 sales*.....	71,551.34
1957 payments applicable to 1958 sales*.....	(35,754.91)
Total expense.....	\$297,565.12
Cost per case sold.....	\$.0690

* These amounts are computed by determining the amount of storage charges which had been paid on the inventories held by each warehouse at the beginning of the year and at the end of the year.

SCHEDULE 7

8253

CONSIGNMENT STORAGE

Borden brand products were stored throughout the country in consignment warehouses and in New York City at the Division's West Street warehouse. These warehouses filled small orders for all of the Company's products. Private label evaporated milk was not stored in such warehouses.

The Division did not distinguish in its accounts between the cost of storing evaporated milk and the cost of storing other products. Therefore we accumulated the evaporated milk costs from underlying records.

Most of the invoices submitted by commercial warehouses for storing and handling the Division's products were paid from the Division's New York Office. We computed the storage costs applicable to Borden brand evaporated milk on each invoice and accumulated the total.

Some warehouse invoices were paid by the Division's offices in Chicago and San Francisco. Some of the invoices paid by these offices could not be located; therefore we computed the charges applicable to evaporated milk on the available invoices and estimated the evaporated milk charges on the missing invoices from each office to be in the same proportion to total storage and handling charges as prevailed on the available invoices.

The Division's records of its West Street warehouse expenses also grouped together the costs incurred on all products. We decided therefore to allocate the West Street costs among products based on the relationship of the product rates actually charged by the Currier-Lee Warehouse in Chicago. (We selected the Currier-Lee Warehouse because it also carried the full line of products in 1957 and, like the West Street warehouse, was in a large metropolitan area.) We

Lee Warehouse in Chicago. (We selected the Currier-Lee Warehouse because it also carried the full line of products in 1957 and, like the West Street warehouse, was in a large metropolitan area.) We

determined the percentage of the evaporated milk total to the totals of all products. We then applied this percentage to the actual costs incurred at the West Street warehouse.

The computation of the total cost of consignment storage of evaporated milk (including West Street storage) is as follows:

Actual charges on invoices paid from New York office..... \$105,138.89
Charges on invoices paid from other offices, estimated as follows:

	Chicago	San Francisco
Evaporated milk charges on available invoices.....	\$ 523.36	\$1,879.98
Estimated charges on other invoices:		2,403.34
Charges for all products on missing invoices.....	1,388.85	8,029.06
Proportion of evaporated milk charges to charges for all products on available invoices.....	4.75%	9.85%
Estimated charges to evaporated milk on missing invoices.	65.97	790.86
West Street warehouse costs:		856.83
Currier-Lee Warehouse rates applied to West Street transactions in evaporated milk.....	\$13,492.68	
Currier-Lee Warehouse rates applied to West Street transactions in all products.	44,481.75	
Proportion of evaporated milk amounts to total amounts.....	30.33%	
Total West Street storage and handling costs.....	77,070.00	
West Street charges applicable to evaporated milk (30.33% of \$77,070.00).....		23,375.33
Total storage and handling charges.....		\$131,774.39
Cost per case sold.....		\$.0305

(See following page)

While the Division stored only Borden brand evaporated milk at consignment warehouses and reserve warehouses, it maintained inventories of both Borden brand and private label at the producing plants. The Division did not segregate storage and handling costs on plant inventories from other operating costs.

The average amount of Borden brand inventory held at the plants was 394,623 cases. By dividing this amount by the average number of cases sold each day, we determined that, on the average, each case of Borden brand was stored at a plant for 33 days. By dividing the average inventory of private label, 71,734 cases, by the average number of cases sold each day, we determined that, on the average, each case of private label was stored at a plant for 24 days. Since Borden brand was stored at the plants for about a third longer than private label, it would seem that a higher cost per case sold was incurred on Borden brand than on private label.

We did not, however, attempt to determine the actual storage costs on Borden brand and private label at the plants, because it seemed that an inordinate amount of time and effort would be required to develop such costs with any degree of accuracy.

1. Accounts Receivable

The sales terms for Borden brand evaporated milk were 2% 10 days, net 30, from date of shipment.

The sales terms for private label evaporated milk were net, from date of final billing but the payment arrangements varied somewhat among customers. Some private label customers were billed at an estimated price as of the date of shipment; these customers paid on the basis of such estimated price and settlements were made after the actual prices had been determined about the 20th of the following month. The other private label customers were not billed until the actual prices were determined.

Because of the differences in the billing and payment arrangements, the Division had a substantially higher investment in private label accounts receivable than in Borden brand accounts receivable, in relation to sales of the two products.

We determined the rate to be applied to the total investment in accounts receivable by an analysis of the Company's operations as they bore on this point. The most appropriate rate appeared to be the one which the Company used in connection with its incentive compensation plans, which was 8%.

Borden brand. We determined the investment in Borden brand accounts receivable by multiplying the net sales for the year, (for net sales see p. 8) \$27,031,818.54, by the portion of a year these amounts were outstanding, 10/365 (on the assumption that these amounts were paid on the tenth day after shipment). This average investment in accounts receivable, \$740,597.77, times 8% equals \$59,247.82, or \$.0137 per case sold.

RESPONDENT'S EXHIBIT No. 76-25

Private label. We determined the investment in private label accounts receivable on the basis of the several billing and payment arrangements. We assumed that remittances from private label customers who were billed on an estimated price basis, were received 10 days after the date of shipment; we dealt with the settlements made with these customers as outlined in the computations. We assumed that remittances from private label customers who were billed only after the actual prices had been determined, were received 45 days after shipment - i.e., we used 15 days (a half-month) as the average shipping date and we assumed remittances were received from the customers on the 30th of the following month.

The computations are as follows:

Net billings to customers who paid 45 days after shipment, \$3,222,857.43, times 45/365.	\$397,338.59
Net billings to customers who paid 10 days after shipment, \$2,717,923.91, times 10/365.	74,463.67
Net balances arising from over- or under-payment of final amount due on the initial billing to customers paying 10 days after shipment, times the portion of a year each amount was outstanding*.....	<u>(41,841.50)</u>
Average investment in accounts receivable.....	<u>\$429,960.76</u>
Average investment in accounts receivable times 8%.....	<u>\$ 34,396.86</u>
Cost per case sold.....	<u>\$.0311</u>
 * Safeway - monthly credit balances outstanding from the 25th of one month (10 days after the average shipment) until 30 days after the end of the calendar quarter.....	 \$(29,918.84)
CROG - monthly credit balances outstanding for varying periods, aggregating.....	(13,650.12)
MPA - total debit balances of \$18,014.93, outstanding from the 25th of one month until the 30th of the following month, or 35 days.....	<u>1,727.46</u>
Total.....	<u>\$(41,841.50)</u>

RESPONDENT'S EXHIBIT No. 76-26

in its plants and reserve and consignment warehouses. In relation to sales, private label inventories were much less and were carried only at plants. This resulted in a substantially higher investment in Borden brand inventories than in private label inventories, in relation to sales of the two products.

We determined the investment in inventories by accumulating the monthly quantities reported by the plants and by consignment and reserve warehouses, multiplying the monthly totals by the values per case shown on the Division's record of the cost of inventory of finished goods, and computing the average of these monthly amounts. We added to this amount the amount of freight which had been paid on cases which were held in inventory.

We applied the same 8% rate to the average investment in inventories that we used to compute the cost of investment in accounts receivable.

Borden brand. The computations of the cost of investment in Borden brand inventories are as follows:

Average Investment in Inventory.....	\$4,383,695.98
Average Investment in freight on inventory*.	119,796.99
Total.....	<u>\$4,503,492.97</u>
Total times 8%.....	<u>\$ 360,279.44</u>
Cost per case sold.....	<u><u>\$.0835</u></u>

* This amount is computed as follows:

Consignment warehouses - average quantity in inventory, 147,497 cases, times average freight cost, \$.35362 per case.....	\$ 52,157.89
Reserve warehouses - average quantity in inventory, 347,764 cases, times average freight cost, \$.19024 per case.....	66,158.62
Smalls at plants not producing smalls - aggregate of the average inventories times the cost per case from the plants shipping them.....	1,480.48
Total.....	<u><u>\$119,796.99</u></u>

SCHEDULE 9

- 3 -

2250

159

Private label. The computations of the cost of investment in private label inventories are as follows:

Average investment in inventory.....	\$354,817.45
Average investment in freight on inventory*...	<u>455.46</u>
Total.....	<u>\$355,272.91</u>
Total times 8%.....	<u>\$ 28,421.83</u>
Cost per case sold.....	<u>\$.0257</u>

* This amount consists entirely of freight on smalls held in inventory by plants not producing smalls. The amounts were computed in the same way as freight on Borden brand smalls, as explained in the footnote on the preceding page.

Cans of Borden brand evaporated milk bore premium labels which were redeemable for merchandise, at the Division's expense. The Division incurred no such expense on any private label evaporated milk packed by it.

The redemption of premium labels was handled by Premium Associates, Inc., (25% owned by Borden) which handled redemptions of coupons for various companies. Premium Associates not only provided the merchandise which was given as premiums, but also maintained the numerous local "Red Scissors" stores and agencies at which coupons could be redeemed, and handled the details of collecting, checking, and accounting for redeemed coupons.

The Division's premium label redemption costs consisted of regular monthly payments to Premium Associates, plus payments to Premium Associates and to others in conjunction with special offers and other miscellaneous matters. The Division also allocated to this account a share of the salary costs of the personnel in the Division's advertising department who checked the number of coupons reported as redeemed by Premium Associates, observed their destruction, etc.

In accordance with the Division's usual practice for both general and tax accounting purposes, we charged all of the foregoing amounts which were paid during the calendar year 1957 against sales made during that year; likewise, we charged against 1957 sales the amount of the adjustment which was made at the end of the year to the reserve which was maintained to take into account payments which would be required in future years to redeem premium labels issued in 1957.

Since premium labels were used on some of the Division's brands of condensed milk, as well as on Borden brand evaporated milk,

it was necessary to allocate the total redemption cost between the two products. We did this on the basis of the coupons issued during the year on the two products.

The computation of the premium label redemption cost on Borden brand evaporated milk is as follows:

Regular monthly payments to Premium Associates, Inc.....	\$931,740.01
Other payments.....	11,755.09
Allocation of salary costs.....	<u>2,012.50</u>
Adjustment of reserve for coupons issued and unredeemed.....	79,925.64
Total redemption cost.....	<u>1,025,433.24</u>
Cost allocated to evaporated milk (proportion of evaporated milk coupons to total coupons issued during year, 97.4342%, times total redemption cost).....	\$ 999,122.67
Cost per case sold.....	<u><u>\$.2316</u></u>

Borden brand. Advertising expenditures were made under two general budgets: (a) the "all Borden" advertising budget administered at the Company level, and (b) the advertising budget of the Food Products Division.

The total "all Borden" cost was \$7,151,602 for all Division: of which \$3,192,070 was allocated as a charge directly against specific products, on the basis of decisions made at the beginning of the year at the Company policy level. Of this latter amount, \$118,880 was charged to Borden brand evaporated milk; and we have included that amount as a charge against Borden brand.

Of the remaining \$3,959,532 of "all Borden" expenditures which were not assigned by the Company to products, we allocated \$115,855.91 to Borden brand evaporated milk, based on dollar sales of Borden brand evaporated milk in relation to the Company's total sales.*

As to the advertising budget of the Food Products Division, most of the expenditures were made for specific products. We have charged against Borden brand evaporated milk the amounts which were spent on that item, and an appropriate share of the costs, such as rent and supervision, which were incurred jointly on several products. We accumulated these charges from the Division's monthly summaries.

* The denominator which we used in making this allocation includes government sales, export sales, and private label sales (except private label sales of evaporated milk). Accordingly, the dollar amount allocated to Borden brand evaporated milk is less than would have resulted if it had been practicable to exclude such government, export, and private label sales.

RESPONDENT'S EXHIBIT No. 76-31

The computation of total advertising costs for Borden brand evaporated milk is as follows:

"All Borden" expense assigned to evaporated milk by the Company.....	\$118,880.00
Portion of "all Borden" expense not assigned to products by the Company (2.9260% of \$3,959,532)	115,855.91
Expenses at Divisional level:	
Direct charges to evaporated milk:	
Radio and television advertising.....	\$134,929.06
Consumer literature (recipe books, etc.) .	64,338.67
"Red Scissors" advertising.....	54,887.53
Point-of-sale material.....	18,057.50
Outside publicity fees and expenses.....	7,018.03
Direct mail.....	3,631.81
Newspaper advertising.....	1,316.36
Art and mechanical expenses.....	1,159.69
Other direct expenses.....	1,853.27
Salaries of advertising department personnel assigned exclusively to evaporated milk.....	10,327.50
Allocation of part of salaries of advertising manager and staff.....	2,823.48
Allocation of rent, and other departmental costs.....	4,194.31
Total.....	\$539,273.12
Cost per case sold.....	\$.1250

Private label. No advertising expense was incurred on private label.

Borden brand. The Division maintained a large sales staff to promote its advertised products. The largest number of sales personnel was classified as field representatives. Their duties involved the promotion of sales by retailers to consumers and the encouragement of retailers to promote the Division's advertised products. The field representatives set up displays in retail stores, filled shelves from the retailers' storerooms, etc. The sales staff included supervisors, who were responsible for training and supervision of the field representatives. The Division's jobbing salesmen sold to the trade in those areas where the Division did not use brokers.

The sales staff also included a manager for each of the 15 sales districts. These District Managers were responsible for selling and promotional activities in their areas. Each of the four Division Managers was in charge of from three to five Districts. The General Sales Manager had overall responsibility for planning and coordinating the efforts of the field sales force.

Some expenses of the field sales force were incurred directly for particular products. These expenses included the cost of product display material and the salary and travel expenses of sales personnel assigned exclusively to one product. The Division classified such expenses as direct field expenses and charged them directly to product expense.

The bulk of the expenses of the field force, and all of the expenses of the General Sales Manager and his staff, were joint or unapplied expenses applicable to all advertised products, and were neither charged nor allocated to specific products by the Division.

Of the total joint or unapplied expenses, about one-half represented salaries and travel expenses of field representatives.

There were no detailed records containing information upon which to base any allocation of the time of these men, as between Borden brand evaporated milk on the one hand and the other advertised products on the other hand. An analysis of the time currently being spent by them in promoting Borden brand evaporated milk would be of no value, as applied to the 1957 situation, because the number and kind of products handled by the field force have changed considerably since then. We accordingly made an allocation of the salaries and expenses of the field representatives, on a dollar sales basis. This resulted in an allocation of 44.0206% to Borden brand evaporated milk.

This in our judgment, based among other things upon the most specific information which we were able to obtain through interviewing your personnel who had knowledge of the facts, is a conservative basis for determining the appropriate amount of the charge against Borden brand evaporated milk. The following were among the factors taken into account in this connection:

- (1) the field representatives were instructed to review the code-datings on cans of evaporated milk, and generally to promote that product, on every call, while there were no comparable instructions as to the other products;
- (2) an appreciable part of their time was spent in physical handling of the products, and evaporated milk is a relatively heavy and bulky product in relation to dollar value, as compared with the other products; and
- (3) an appreciable amount of time was spent putting cans of Borden brand evaporated milk into "tote carton" carriers, which were not used on the other products.

Most of the other expenses of the sales department arose from the supervisory and administrative functions related to the field representatives; we decided, therefore, that the dollar sales

spread, applied to the other expenses of the field force and the General Sales Manager, was the best available method of determining the cost applicable to Borden brand evaporated milk.

The cost data were derived from the regular monthly summaries maintained by the Division. The computations of the expense are as follows:

(See following page)

RESPONDENT'S EXHIBIT No. 76-35

Direct expenses:	
Salaries, travel, etc.....	\$ 112,926.01
Advertising, display and demon- stration materials and expenses.....	49,696.59
Samples.....	4,453.82
Other.....	98.50
Total.....	\$ 167,174.92
Joint or unapplied expenses:	
Salaries, travel expense, etc.:	
Field representatives.....	1,350,603.16
Payments to brokers for retail store work.....	56,461.13
Supervisors and assistants.....	73,653.30
Jobbing salesmen.....	114,574.86
Division and district managers.....	272,575.70
General Sales Manager and staff.....	138,127.00
Clerical.....	199,431.46
Employee benefits (retirement plan, social security taxes, etc.)	134,269.80
Office expenses - rent, stationery, etc.....	182,669.68
Freight on advertising and display materials.....	55,994.96
Various local taxes.....	49,175.16
Display and demonstration materials and expenses, not for particular products.....	46,271.17
Sales material for internal use.....	20,644.34
Conventions - booth rentals, etc.....	12,102.18
Other.....	34,107.54
Less charges to export and industrial products, etc.....	(19,439.04)
Total.....	2,721,222.40
Deduct allocation to private label (see below).....	974.95
Allocation to advertised products.....	<u>\$2,720,247.45</u>
Allocation to Borden brand evaporated milk (44.0206% of above amount).....	<u>1,197,469.25</u>
Total cost.....	<u>\$1,364,644.17</u>
Cost per case sold.....	<u>\$.3163</u>

Private label. We were informed that, although none of the sales staff had any responsibility for private label matters, two Division Managers had in fact performed some minor services in connec-

... made liberal estimates of the proportion of their time spent on the two or three instances involved, and applied these percentages to the total expense incurred by each of their offices. (These amounts were then deducted from the total unapplied expenses, before spreading these expenses among the advertised products.)

The computations are as follows:

New York Division Manager	
(1% of \$27,709.13)	\$277.09
San Francisco Division Manager	
(2% of \$34,892.75)	<u>697.86</u>
Total	<u>\$974.95</u>
Cost per case sold	<u>\$.0009</u>

BROKERS' COMMISSIONS

Brokers performed the function of selling the Division's advertised products to wholesalers and chains in those areas where the Division did not have its own jobbing salesmen. The brokers also prepared invoices, inventory reports, etc., in connection with sales out of the consignment storage warehouses in their brokerage areas. The brokers were compensated by commissions computed on sales in their areas.

The commission rates on products other than evaporated milk ranged from 2% to 3%. For Borden brand evaporated milk, however, the rate had been five cents per case for many years and had not been raised as the price increased. If a 2% rate had been used for Borden brand evaporated milk in 1957, the average rate per case would have been about thirteen cents.

In order to meet pressure from brokers for higher commissions on evaporated milk, and at the same time to forestall possible objections from brokers to the Division's by-passing them in the sale of private label evaporated milk, the Division initiated a 2-1/2 cents per case commission on some sales of private label.

In view of the reasons for the computation of commissions on some private label sales, and since the brokers were not expected to perform any services or assume any responsibilities in connection with the sale of private label, it is our opinion that commissions computed on private label sales should not be considered a cost applicable to sales of private label but a cost applicable to sales of Borden brand evaporated milk.

We accumulated the total of brokers' commissions for the year from the monthly summaries of commissions earned. The annual totals are as follows:

RESPONDENT'S EXHIBIT No. 76-38

Brand evaporated milk.....	\$170,151.48
Commissions computed on sales of private label evaporated milk.....	<u>13,879.31</u>
Total.....	<u>\$184,030.79</u>
Cost per case sold.....	<u>\$.0427</u>

EVAPORATED MILK PROMOTION DEPARTMENT

The Product Manager for evaporated milk, Mr. A. J. Berry, was the Division's official who was responsible for promotion and merchandising planning of Borden brand evaporated milk. He also handled all inquiries and problems relating to private label evaporated milk sales (except for the minor contacts by two Division Managers discussed in Schedule 12).

The expenses charged to his department included salary and office expenses, the cost of the Company's membership in the Evaporated Milk Association, and certain other expenses arising from the merchandising of Borden brand evaporated milk. We accumulated the expenses from the Division's monthly summaries, by type of expense.

We allocated to Borden brand evaporated milk the expenses which arose from promotional activities for that product, and the salaries of personnel who worked entirely on that product.

Since we could find no precise method of determining the time which Mr. Berry spent on Borden brand and on private label matters, we allocated his salary and travel expense between Borden brand and private label on the basis of the number of cases sold. We allocated the salaries of his secretary and his assistant, the general office expenses, and the dues paid to the Evaporated Milk Association in the same manner.

The computations are as follows:

(See following page)

RESPONDENT'S EXHIBIT No. 76-40

	<u>Brand</u>	<u>Label</u>
Amounts charged entirely to Borden brand:		
Salaries.....	\$12,900.00	
Travel.....	1,338.00	
Employee benefits (retirement plan, social security taxes, etc.).....	1,014.15	
Conventions - booth rentals, etc.....	4,420.16	
Advertising and promotional materials.....	3,859.76	
Consumer survey.....	2,432.15	
Sales material for internal use.....	1,819.41	
Other.....	804.92	
Amounts allocated by cases sold:		
Salaries.....	\$29,820.00	
Travel.....	8,570.37	
Employee benefits (retirement plan, social security taxes, etc.).....	2,344.35	
Evaporated Milk Association dues.....	25,651.89	
Other.....	382.97	
Total.....	<u>66,769.58</u>	
Allocated to Borden brand.....	53,158.45	\$13,611.13
Allocated to private label.....	\$81,747.00	\$13,611.13
Total expenses.....	\$.0189	\$.0123
Cost per case sold.....		

CLERICAL

The general offices of the Company and of its Food Products Division were in New York from which the field production and sales activities were controlled and coordinated and where accounting and other data were accumulated.

The functions of many of the service departments at the New York office did not relate at all to evaporated milk, while the functions of some service departments did not relate to evaporated milk in a manner that would produce a cost difference between Borden brand and private label. The functions of the service departments which did relate to evaporated milk were those involving sales invoices, controlling and recording inventories, etc.

The functions of the service departments which did relate to evaporated milk also related to other products of the Food Products Division (including export products) and generally to products of other Divisions. All but one of these departments regularly prepared analyses, for budget purposes, of their time and effort to arrive at a percentage allocation to each Division; we reviewed the allocation methods used for 1957 and found them to be generally reasonable. (We made a separate analysis of the department which had not prepared one.)

We made allocations of the departmental expenses which resulted in cost differences between Borden brand and private label evaporated milk; the allocations were based on the departmental analyses described above and on supplementary information relating to numbers of documents processed, numbers of entries, etc. The following table shows the departments for which we found appreciable cost differences between Borden brand and private label evaporated milk, a brief explanation of the departmental functions, and the expenses we have allocated to Borden brand and to private label evaporated milk:

1267

821

128

FOLDOUTS TOO LARGE TO BE FILMED

1267

821

SHIPMENTS

20

[illegible]

RESPONDENT'S EXHIBIT No. 79-C

PREPARED BY _____ DATE _____
 REVIEWED BY _____ DATE _____
 1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING QUANTITIES SHIPPED FROM
 RESERVE WAREHOUSES) OF BORDEN BRAND EVAPORATED MILK PRODUCED AT
Wheat Ridge PLANT

SHIPMENTS				SHIPPED FROM RESERVE WAREHOUSES	
BROKERAGE DISTRICT		CASES	% OF TOTAL	CASES	WAREHOUSES
Totals (from)		3,169	5.4	6,912	
New Orleans	La	240	1.2		
Mobile	Ala	620	1.1	1,117	
Montgomery	Va	1,000	3.7	3,150	
Port of Spain	Trinidad	519	1		
Port of Spain	Trinidad	617	1		
Port of Spain	Trinidad	4,800	9.2	2,000	
Port of Spain	Trinidad	5,700	9.7	2,200	
Port of Spain	Trinidad	600	1		
Port of Spain	Trinidad	5,300	1		
Port of Spain	Trinidad	4,600	5.2	8,400	
Port of Spain	Trinidad	4,130	7.1	3,400	
Port of Spain	Trinidad	1,300	1.2		
Port of Spain	Trinidad	1,200	1.3		
Port of Spain	Trinidad	1,700	2.3		
Port of Spain	Trinidad	9,800	1.7	1,940	
Port of Spain	Trinidad	1,900	2.4	600	
Totals		3,169	100%	13,500	41

RESERVE WAREHOUSES) OF BORDEN BRAND EVAPORATED MILK PRODUCED AT
PLANT

SHIPPED FROM RESERVE

WAREHOUSES

SHIPMENTS

40 OF

TOTAL

CASES

BROKERAGE DISTRICT

CASES

WAREHOUSE'S

NON E

..... SHIPMENTS % OF

SHIPPED FROM RESERVE

WAREHOUSES

CASES WAREHOUSES

PROCESSED DISTRICT CASES TOTAL

Alabama	NY	19025	33 1/2	1
Alaska	Pa	2850	5	-
Arizona	Pa	1150	2	-
Arkansas	Pa	1150	2	-
California	Pa	4424	85	-
Colorado	Pa	1200	2	-
Connecticut	Pa	1125	3	-
Delaware	Pa	71610	125	13 1/2
District of Columbia	Pa	35340	62	-
Florida	Pa	725	1	-
Georgia	Pa	2315	4	-
Idaho	Pa	1400	2	-
Illinois	Pa	1370	2	-
Indiana	Pa	16750	29	-
Iowa	Pa	650	1	-
Kansas	Pa	1210	2	-
Kentucky	Pa	645	1.1	-
Louisiana	Pa	375	1	-
Maine	Pa	1700	3	-
Maryland	Pa	2370	4	-
Massachusetts	Pa	2100	4	-
Michigan	Pa	14029	25	475
Minnesota	Pa	1175	2	-
Mississippi	Pa	1600	3	-
Missouri	Pa	2325	4	-
Montana	Pa	750	1	-
Nebraska	Pa	665	1	-
Nevada	Pa	1350	2	-
New Hampshire	Pa	5725	45	47.7
New Jersey	Pa	44725	75	-
New Mexico	Pa	26175	46	-
New York	Pa	96175	165	126.2
North Carolina	Pa	1350	2	-
North Dakota	Pa	23000	40	-
Ohio	Pa	2165	4	-
Oklahoma	Pa	10625	17	1310
Oregon	Pa	14825	16.4	9650
Pennsylvania	Pa	2365	4	-
Rhode Island	Pa	2540	5	-
South Carolina	Pa	9675	17	3400
South Dakota	Pa	6464	10	1469
Tennessee	Pa	183	1	-
Texas	Pa	7225	12	-
Utah	Pa	183	1	-
Vermont	Pa	183	1	-
Virginia	Pa	183	1	-
Washington	Pa	183	1	-
West Virginia	Pa	183	1	-
Wisconsin	Pa	183	1	-
Wyoming	Pa	183	1	-

183

7225

SHIPPED FROM RESERVE
WAREHOUSES

939
RESPONDENT'S EXHIBIT No. 79-H

SHIPMENTS

% OF

CASES WAREHOUSES

TOTAL

BROTAGE DISTRICT

Albany	NY	4	1.1	1.1	
Albany	Pa	2450	1.3		
Albany	Va	27220	12.5		
Albany	Wash	516	2.3		
Albany	NY	7420	4.1		
Albany	W Va	3110	1.4		
Albany	W Va	13255	5.8		
Albany	Pa	1648	7.8		
Albany	Pa	25205	1.6		
Albany	Wash	7710	4.4		
Albany	Wash	431	6.7		
Albany	Pa	1410	1.6		
Albany	Wash	1050	5.5		
Albany	Wash	1020	5.5		
Albany	NY	710	3.3		
Albany	NY	2400	1.1		
Albany	Conn	2135	1.3		
Albany	NY	10170	4.6		
Albany	NY	10000	4.5		
Albany	Va	12000	5.5		
Albany	Pa	22121	9.7		
Albany	Pa	15000	6.7		
Albany	Wash	5245	2.4		
Albany	Pa	11205	5.0		
Albany	Va	11350	5.1		
Albany	Va	12320	5.5		
Albany	NY	3375	1.5		
Albany	Pa	2520	1.2		
Albany	NY	11465	5.2		
Total		200,649	101.0	10	

8293

185

PREPARED BY DATE
REVIEWED BY DATE

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF BORDEN BRAND EVAPORATED MILK PRODUCED AT

Wilmington Pa. PLANT

SHIPPED FROM RESERVE

SHIPMENTS

BROKERAGE DISTRICT	CASES	% OF TOTAL	WAREHOUSES	
			CASES	WAREHOUSES

Wilmington	714	60.0	1.2	32.1
Philadelphia	Pd	24170	4.7	12128
New York	Ny	82570	15.7	17215
Baltimore	Ba	43014	.7	4010
Washington	Was	22630	4.4	9220
San Francisco	Sf	58334	11.2	16520
Los Angeles	La	2960	.6	1500
San Antonio	San	11035	2.1	8700
San Diego	San	14015	2.7	5610
San Jose	San	12220	2.0	5400
San Luis Obispo	San	3510	.7	1000
San Marcos	San	2600	.5	2000
San Mateo	San	3600	.7	1000
San Rafael	San	13700	2.6	6000
San Ramon	San	25240	4.7	12310
San Jose	San	17323	3.4	7313
San Jose	San	1200	.2	1000
San Jose	San	4374	3.4	5000
San Jose	San	1543	10.8	17300
San Jose	San	5140	1.0	5140
San Jose	San	19453	3.7	16800
San Jose	San	3000	.7	2800
San Jose	San	1730	1.5	3000
San Jose	San	7115	1.5	4000
San Jose	San	6000	.6	2000
San Jose	San	57236	11.1	2200
San Jose	San	10675	2.0	2700

Total Cases 1000

Total 31

By 7-2-1 7-2-1

Amounts of Borden Brand Evaporated Milk

Purchased By

Handlers of Borden-Packed Private Label

Note: The handlers referred to below include all of those listed in paragraphs 1-5 of CX 5296, except those who began purchasing Borden-packed private label after December 31, 1957.

Annual Purchases of Borden Brand
(cases, on tall size basis)

1955 1956 1957

A. Handlers who began handling Borden-packed private label in 1956 or earlier

183,501 175,343 176,624

B. Handlers who began handling Borden-packed private label in 1957

408,516 389,726 396,225

FEDERAL TRADE COMMISSION
 RECEIVED 7/29 1952 86
 Borden's
 4/20/60
 By TH
 P 4-88, inc
 12-11-52

THE BORDEN COMPANY

Sales of Borden Brand and Private Label
Evaporated Milk - 1952

(Cases, tall 48 size basis)

Borden Brand	4,650,921
Private Label	584,931
Total	<u>5,235,852</u>

NATIONAL
ANALYSTS

TABLE 1

Proportions of Respondents Purchasing Borden Brand and Private Label
Evaporated Milk at Varying Price Differentials*

Price Differential per Can**	Total Purchasers	Purchased Borden Brand		Purchased Private Label		Standard Error of Percentage
		Percent		Percent		
0¢	311	86.5		13.5		1.9
1¢	269	74.0		26.0		2.7
2¢	331	71.6		28.4		2.5
3¢	364	63.2		36.8		2.5
4¢	356	69.9		30.1		2.4
5¢	320	68.4		31.6		2.6

*There were a total of 1,951 purchasers, of whom 1,403 or 72% purchased Borden brand and 548 or 28% purchased private label.

**The price of the Borden brand remained constant at three cans for 49¢. The private label brand varied downward accordingly.

FEDERAL TRADE COMMISSION

DOCKET NO. 7129

IN THE MATTER OF

DATE 7-11-61

WITNESS

ACE REPORTING CO., INC. Official Reporter

By AB B. Carter

COMMISSION EXHIBIT NO. BORDEN BRAND, 1957

102-A

Borden

Official Reporter

By AB B. Carter

Cases, Percentages of Year

Jan-June July-Dec. Jan-June July-Dec.

Chester and Lewisburg
"Sales", per Mr. Steele's
method

59,255 275,716 17.7% 82.3%

Actual Sales, Tall 48's
and Small 48's,
Southern Division

881,638 841,074.5 51.2% 48.8%

Actual Sales, Total

2,180,741.79 2,133,668.93 50.5% 49.5%

Chester and Lewisburg
Shipments, per
CX5243-5248 and
5263-5270

120,519 148,142 44.9% 55.1%

Chester and Lewisburg
Plant Shipments -
Direct to Customers

495,373 283,067.5 63.6% 36.4%

Chester and Lewisburg
Plant Shipments -
Direct to Customers
and to Consignment
Warehouses

664,454 436,553.5 60.3% 39.7%

Chester and Lewisburg
Plant Shipments -
Total (direct to
customers; to consign-
ment warehouses; and to
reserve warehouses)

860,749 672,399.5 56.1% 43.9%

122
Ry 102-17

FILE 7-11-61 WMSB BARRY
ACE REPORTING CO., INC. CHICAGO REPORTER
BY J. P. Parker

BORDEN BRAND, NOVEMBER AND DECEMBER, 1957

"Sales", per Mr. Steele's Method:

	<u>Cases</u>	<u>Amount</u>
November	51,661.5	\$337,246.88
December	<u>49,395.5</u>	<u>326,010.30</u>
Total	101,057	\$663,257.18

Average Price: \$6.5632

Actual Sales, Southern Division:

	<u>Cases</u>	<u>Dollars</u>
November	259,746.5	\$1,675,114.89
December	<u>88,516.5</u>	<u>581,201.57</u>
Total	348,263	\$2,256,316.46

Average Price: \$6.4788

COMPUTATION OF PRICE DIFFERENTIAL FROM CX5243-5248 and CX5263-5270

CX	Number of Cases	Borden Brand Amount	Private Label Amount
5243	14,000	\$ 90,724.50	\$ 68,934.24
5244	11,040	71,406.75	54,189.63
5245	19,124	123,349.80	94,017.21
5246	13,300	85,784.50	65,761.36
5247	13,770	89,140.75	67,716.04
5248	5,825	37,571.25	28,822.47
5263	18,725	119,711.25	93,369.98
5264	19,040	121,777.50	94,714.90
5265	19,246	123,007.20	95,836.06
5266	23,475	151,016.25	116,758.04
5267	23,150	148,553.75	115,467.96
5268	38,875	250,368.75	193,543.12
5269	16,720	107,562.75	83,102.68
Total	236,290	\$1,519,975.00	\$1,172,233.69

Average Prices per case:

Borden Brand:	\$6.4327
Private Label:	4.9610
Differential	\$1.4717

FEDERAL TRADE COMMISSION
 ORDER IN 7/29
 IN THE MATTER OF
 DATE 7-11-61
 WITNESSES
 ACE REPORTING CO. INC. Official Reporter
 BY *W. H. H. H.*

Borden Brand-Southern Division

	<u>Cases</u>	<u>Dollars</u>
Jan.	140,304.5	\$ 884,236.54
Feb.	161,138	1,015,466.67
March	188,617.5	1,187,470.56
April	191,990	1,213,643.66
May	93,680.5	604,678.18
June	105,907.5	682,813.41
July	118,439.5	764,244.81
Aug.	130,476.5	841,837.23
Sept.	130,163	839,709.98
Oct.	113,732.5	733,176.59
Nov.	259,746.5	1,675,114.89
Dec.	88,516.5	581,201.57
Total	1,722,712.5	\$11,023,594.09

Private Label - Chester and Lewisburg

	<u>Cases</u>	<u>Price per Case</u>	<u>Dollars</u> (Cases multiplied by price per case)
	140,304.5	\$5.0393	\$ 707,036.47
	161,138	5.0216	809,170.58
	188,617.5	4.9709	937,598.73
	191,990	4.8999	940,731.80
	93,680.5	4.8792	457,085.90
	105,907.5	4.8855	517,411.09
	118,439.5	4.8616	575,805.47
	130,476.5	4.8775	636,399.13
	130,163	4.8783	634,974.16
	113,732.5	4.9056	557,926.15
	259,746.5	4.9471	1,284,991.91
	88,516.5	4.9914	441,821.26
Total	1,722,712.5		\$8,500,952.65

RESPONDENT'S EXHIBIT No. 107-A

949

Average Prices per case:

Borden Brand:	\$6.3990
Private Label:	<u>4.9346</u>
Differential	\$1.4644

195

FEDERAL TRADE COMMISSION
 EXHIBIT NO. 7/29
 IN THE MATTER OF
 DATE 7-11-61
 BY 10/11/61
 107-A
 Borden
 WILKES BARRE
 ACE REPORTING CO. INC. ORIGINATED REPORT

RESPONDENT'S EXHIBIT No. 114

IN CANADA

FEDERAL TRADE COMMISSION

DOCKET NO. 7129 EXHIBIT NO.

IN THE MATTER OF

DATE 7-1-53

AGE REPORTING CO. INC. Confidential Report

By

Summary of Price Differences and Cost Differences between Sale and
Distribution of Borden Brand Evaporated Milk with Private Label
Evaporated Milk shipped from Chester, S. C. and Lewisburg, Tenn. Plants -
Year 1957.

	Borden Brand			Private Label		
	No. of Cases	Total Amount	Per Case	No. of Cases	Total Amount	Per Case
Gross Sales	334,971	\$2,169,310.15	\$6.4761	334,971	\$1,648,865.71	\$4.9224
Less: Sales Deductions:						
Damaged Goods		3,751.68	.0112		1,509.66	.0045
Cash Discount		43,311.17	.1293		-	-
Net Sales		\$2,122,247.30	\$6.3356		\$1,647,356.05	\$4.9179
Costs and Expenses:						
Label and Cartons		\$ 56,777.58	\$.1695		\$ 38,035.65	\$.1135
Primary Freight		93,892.37	.2803		450.12	.0013
Secondary Freight		3,751.68	.0112		-	-
Reserve Storage		32,559.18	.0972		-	-
Consignment Storage		10,216.61	.0305		-	-
Investment in Accounts Receivable & Inventories		-	-		-	-
Premium Label Redemption		75,267.98	.2247		-	-
Advertising		39,794.55	.1188		-	-
Sales Department		97,677.54	.2916		301.47	.0009
Brokers' Commissions		13,197.86	.0394		4,220.63	.0126
Promotion Department		6,330.95	.0189		4,120.14	.0123
Clerical Expense		5,058.06	.0151		2,076.82	.0062
Total Costs and Expenses		\$ 434,524.36	\$1.2972		\$ 49,204.83	\$.1468
Cost Failure						

1957

(2)

Borden brand compared with
dollar price ratio to
all Borden brand products
dollar sales for Southern
Division of Food Products Division

52.10%

Borden brand compared with
gross margin (after regular
adjustments) for all Borden
brand products gross margin
(after regular adjustments)
for Southern Division of Food
Products Division

42.82%

FEDERAL TRADE COMMISSION
DOCKET NO. 7129
IN THE MATTER OF
Borden
DATE 7-11-59
WILLIS B. BANCY
AGE REPORTING CO., INC. Official Reporter
By W.B.B. ft

197

INDEX

	PAGE
Errata in Volumes I, II and III -----	III
Final Order -----	952
Opinion on Respondent's Objections to Proposed Order -----	954
Reprinted Exhibits (exhibits which were reproduced at the pages indicated but which are not completely legible):	
Commission's Exhibit No. 2200 (originally re- produced at pages 780-81) -----	956
Commission's Exhibit No. 2201-A (originally re- produced at page 782) -----	958
Commission's Exhibit No. 2201-B (originally re- produced at pages 784-85) -----	959
Respondent's Exhibit No. 77-A (originally re- produced at page 930) -----	961
Respondent's Exhibit No. 77-B (originally re- produced at page 931) -----	962
Respondent's Exhibit No. 79-A (originally re- produced at page 932) -----	963
Respondent's Exhibit No. 79-B (originally re- produced at page 933) -----	964
Respondent's Exhibit No. 79-C (originally re- produced at page 934) -----	965
Respondent's Exhibit No. 79-D (originally re- produced at page 935) -----	966
Respondent's Exhibit No. 79-E (originally re- produced at page 936) -----	967
Respondent's Exhibit No. 79-F (originally re- produced at page 937) -----	968
Respondent's Exhibit No. 79-G (originally re- produced at page 938) -----	969
Respondent's Exhibit No. 79-H (originally re- produced at page 939) -----	970
Respondent's Exhibit No. 79-I (originally re- produced at page 940) -----	971
Respondent's Exhibit No. 80 (originally repro- duced at page 941) -----	972
Respondent's Exhibit No. 81 (originally repro- duced at page 942) -----	973



III

ERRATA

<u>Page</u>	<u>Line</u>	<u>Change to be made</u>
4	15	Change "Bordon Label" in the middle column to "Buyer Label"
193	6	Insert at the end of the line, after "all", the words "of them. I don't know that I know all"
257	19	Insert after "A" and before "Vice versa" the word "And"
496	2	Insert, following this line, "A That's right."
510	8-9	Interchange these 2 lines
535	26	Insert at the end of the line, after "plant", the words "and go along on a status quo basis and then switch"
602	21	Insert, following this line, "A No, Sir."
699	2	Change "96" to "76"
719	26	Delete "ing its business."
736	11	Change "sir? If you don't have" to "to the purchaser, the"

FINAL ORDER

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of

THE BORDEN COMPANY,
a corporation.

DOCKET NO. 7129

Respondent having filed, pursuant to the Commission's order of November 28, 1962, objections to the Commission's proposed order in this proceeding, reasons in support thereof, and a proposed alternative order, complaint counsel having filed a reply to the objections and respondent having filed a further statement with respect thereto; and

The Commission, for the reasons stated in the accompanying opinion, having rejected respondent's objections and having further determined that its proposed order to cease and desist should be issued as the final order of the Commission:

IT IS ORDERED that respondent The Borden Company, a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of food products in

commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality by selling to any purchaser at a price higher than the price charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

The term "price" as used in this order means the net price after all discounts, including cash discount, rebates or other allowances, including damaged goods allowance, have been deducted.

IT IS FURTHER ORDERED that respondent The Borden Company, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

By the Commission, Commissioner Elman dissenting and Commissioners Anderson and Higginbotham not participating.

(Signed) JOSEPH W. SHEA

Joseph W. Shea,
Secretary.

ISSUED: January 30, 1963.

OPINION ON RESPONDENT'S OBJECTIONS TO PROPOSED ORDER

(Number and Title Omitted)

Respondent, as provided in the Commission's order issued November 28, 1962, has filed its objections to the Commission's proposed order, a statement of its supporting reasons and its alternative form of order. Counsel supporting the complaint has filed a reply thereto, and respondent has also filed a further statement.

Respondent first requests that the Commission delete "food products" and substitute "evaporated milk." Evaporated milk, as the record shows, is but one of a number of food products manufactured and sold by respondent. Respondent sells food items such as Borden's Malted Milk, Borden's None-Such Mince Meat, Borden's Instant Hot Chocolate, Borden's Instant Coffee and Borden's Starlac (a powdered milk product), to name just a few. Borden's line of food products also includes items in the dairy field such as cheese, ice cream and fluid milk and other special products such as infant foods. Since the same or a similar price discrimination practice could be used as well for such other products, the order, to be effective, was made to include all "food products." See *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 343 (7th Cir. 1960), cert. denied 364 U. S. 883; *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, ____ F. 2d ____ (2nd Cir. 1962), 31 L. W. 2284. Respondent's request to narrow the order to cover only evaporated milk is rejected.

Respondent suggests the inclusion in the order of the following words: "in any case where (a) the lower price undercuts the price at which the purchaser buying at such lower price may buy from another seller, and (b) the lower price has not been offered to the purchaser buying at the higher price." This modification is rejected as inappro-

appropriate in light of the facts in this case and the type of order issued.

Respondent lastly requests that the following definition be included in the order: "The term 'purchaser' as used in this order means the person to whom the respondent sells and from whom the respondent receives payment." It asserts that this suggested modification is for the purpose of clarifying a claimed ambiguity as to the meaning of the proposed order. The order as written covers price discriminations where the purchaser paying the higher price or his customer competes with the purchaser paying the lower price.

We believe this order is clear and explicit in its application to the facts of this case. In the instance respondent mentions as resulting in the asserted ambiguity, the Commission found that wholesaler Thomas & Howard purchased the shipment in question through Biddle Purchasing Company. An order defining purchaser as requested could be interpreted as excluding the actual purchaser where payment is made through an agent or representative. That would be an inappropriate result. If a question should arise in the future as to the relationship between respondent and a party from which it receives payment for the shipment of goods, the matter can best be resolved under regular compliance procedures upon the basis of the facts shown in the particular instance. We, therefore, reject the respondent's request for defining purchaser in the order.

Commissioner Elman dissented to the decision herein and Commissioners Anderson and Higginbotham did not participate in the decision herein.

January 30, 1963

COMMISSION'S EXHIBIT NO. 2200

Customer—DIXIE HOME STORES

Address—Greenville, South Carolina

Broker—Biddle Terms—2% 10 Days Labels—Dixie Home

Allow 1/10% Swell Allowance Routing—CMSTP&P Monon—Southern

Prepaid ☒
 Freight ☒ —Collect

Date	Inv. No.	Number of Cases				Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
		Tall	48-B	96-B	No. 10								Gross	Net
1952														
5-2	9220	1145	173			7,573.73							6.15	
5-15	9283	1145	227			7,739.78							6.15	
1955													5.55	
12-21	1838	1001	110			5,860.80							2.775	
12-27	1852	1001	110			5,881.92	(Winn-Dixie Stores—Columbia, S. C.)						5.57	
12-29	1869	1001	110			5,860.80							2.785	
1956													5.55	
1-6	1906	1001	110			5,860.80							2.775	
1-12	1931	1000	110			5,855.25							5.55	
12-26	3471	1101	300			7,168.23	Winn Dixie—Greenville, S. C.						2.775	
1957													5.73	
1-21	3593	1100	300			7,162.50	Winn Dixie—Greenville, S. C.						2.865	
1-21	3594	1100	200			6,876.00	Winn Dixie—Columbia, S. C.						5.73	
1-25	3631	1100	200			6,876.00	Winn Dixie—Columbia, S. C.						2.865	
1-28	3632	1101	300			7,168.23	Winn Dixie—Greenville, S. C.						5.73	
2-1	3670	1101	300			7,168.23	Winn Dixie—Greenville, S. C.						2.865	

COMMISSION'S EXHIBIT NO. 2200—continued

Customer—DIXIE HOME STORES, INC.

Address—Greenville, South Carolina

Broker—Biddle

Terms 2% 10 Days
Net 30 Days

Labels—Dixie Home

Routing—CMSTP&P—Monon—Southern

Prepaid
Freight—CollectLess 1/10th of 1% in
Lieu of Normal Swells

Date	Inv. No.	Number of Cases			Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
		Tail	48-B	96-B								No. 10	Gross	Net
2-4-57	3674	1202			6,887.46		Winn Dixie—Greenville, S. C.						5.73
2-6-57	3699	1101	200		6,881.73		Winn Dixie—Greenville, S. C.						5.73
2-18-57	3748	1101	300		7,168.23		Winn Dixie—Greenville, S. C.						2.865
2-25-57	3785	1100	200		6,876.00	"	"	"	"	"		5.73	2.865
2-27-57	3803	1100	300		7,162.50	"	"	"	"	"		5.73	2.865
3-1-57	3825	1200			6,876.00	"	"	"	"	"		5.73	
3-4-57	3830	1200			6,876.00	"	"	"	"	"		5.73	
3-11-57	3850	1200	640		8,709.60	"	"	"	"	"		5.73	2.865
3-19-57	3880	1200	220		7,506.30	"	"	"	"	"		5.73	2.865
4-2-57	3951	1200	220		7,506.30	"	"	"	"	"		5.73	2.865
4-9-57	3973	1200	220		7,506.30	"	"	"	"	"		5.73	2.865

21,357 Cs—12 months \$122,375.11

COMMISSION'S EXHIBIT NO. 2201-A

Customer—CENTRAL RETAILER-OWNED GROCERS, INC.

Address—155 North Wacker Drive—Chicago, Illinois

Broker—

Terms—Net 10 days

Labels—Shurfine

Routing—Howard's Cartage

Prepaid add Freight
Freight—xxxxx

Date	Inv. No.	Number of Cases				Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
		Tall	48-B	96-B	No. 10								Gross	Net
1956														
6-27	2639	100				509.00	Associated Groc.							5.09
						2,481.38	United Grocers							5.09
7-17	2708	475	25			14,048.03								2.545

4677 Cs—12 months \$23,925.06

COMMISSION'S EXHIBIT NO. 2201-B

Customer—CENTRAL DIVISION—NATIONAL RETAILER-OWNED GROCERS, INC.

Prepaid
Freight—Collect

Address—308 West Washington Street, Chicago, Illinois

Less
.07 Cs

Broker—C.D. NROG Terms—10 Days Net Labels—Shurfine

Routing—

Date	Inv. No.	Number of Cases				Gross Billing	Labels	Freight	Brok.	Discount	Return & Allow.	Decline	Per Case	
		Tall	48-B	96-B	No. 10								Gross	Net
1954														
1-19	1150	400				1,998.00		+ 41¢ case Frt Chgs or \$164.00					4.99½	
2-1														
5-3	1687	100				471.50							4.715	
5-17	1727	350	100			1,886.05							4.715	
6-7	1801	376	50			1,860.64							4.64	
6-15	1885	450				2,088.00		+ 14¢ Cs Frt Chgs					4.64	
8-24	2264	350	100			1,887.20		+ 14¢ Cs Frt Chgs					4.718	
9-29	2436	100				479.80		+ 29½¢ Cs Cartage					4.798	
10-7	2495	400	50			2,063.38		+ 14¢ Cs Freight					4.855	
11-12	2716	400	50			2,063.38		+ 14¢ Cs Freight					4.855	
1955														
1-3	243	425				2,120.75		+ 14¢ Cs Freight					4.99	
2-2	376	402	50			2,173.43		+ 14¢ Cs Freight					5.09	
2-24	481	100				503.00		+ 29½¢ Cs "					5.03	
3-16	552	400	50			2,116.00		+ 14¢ Cs Freight					4.98	
3-22	580	100				498.00		+ 10¢ Cs Freight					2.49	4.98

Prepaid ☒ —Add Frt.
Freight—Collect

Broker—

Terms—

Routing—

Labels—Shurfine

[illegible]

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK SHOWING PERCENTAGE OF TOTAL SHIPMENTS BY PRODUCING PLANTS

Shipments		Percentage of Total Cases by Producing Plants							Shipments From Reserve Warehouses		
Brokerage District		Total Cases	Chester S.C.	Dixon Ill.	Ft. Scott Kans.	Lewisburg Tenn.	New London Wisc.	Perrinton Mich.	Wellsboro Pa.	Cases	Warehouses
any	N. Y.	36,697		19.6%			52.0%	11.8%		10,585	2
ona	Pa.	47,865	3.3%	34.2			6.0		50.3	24,625	4
nta	Ga.	55,293	13.3	2.5		82.1%	2.1	6.2		16,122	3
usta	Ga.	23,086	79.1			15.9	5.0			3,666	1
more	Md.	132,609		1.0			36.7		62.3	17,255	1
ingham	Ala.	81,430	9.6	2.3		86.6	1.5			14,725	2
field	Va.	106,375	6.3	60.1		1.1	1.8	26.2	4.5	23,720	6
on	Mass.	105,730		6.0			67.7	4.9	21.4	35,535	5
alo	N. Y.	106,494		3.5			33.2	8.5	54.8	19,420	3
leston	S. C.	16,335	100.0							—	—
	W. Va.	21,090		71.2				14.8	14.0	6,780	3
lotte	N. C.	49,255	100.0							2,380	1
lanoooga	Tenn.	44,780	10.0	7.4		81.0	1.6			9,800	1
ago	Ill.	3,715		37.7			62.3			—	—
tsburg	W. Va.	68,651		64.5				19.4	16.1	21,070	4
eland	O.	1,685						100.0		—	—
mbus	O.	8,687		59.6				40.4		1,657	1
berland	Md.	49,900		49.5			2.8	19.6	28.1	13,325	4
as	Tex.	8,448		14.9	85.1%					—	—
ver	Colo.	7,475			81.7		18.3			—	—
Moines	Ia.	1,525		100.0						—	—
nit	Mich.	6,220		30.7				69.3		—	—
ict of Columbia	D. C.	41,060	4.6	27.7			40.8	1.9	25.0	13,495	4
th	Minn.	3,850		82.3			17.7			—	—
aso	Tex.	37,603		48.4	51.6					—	—
	Pa.	8,420		25.1			16.5	16.7	41.7	2,800	2
o	N. D.	8,040		20.2			79.8			—	—
	Mich.	1,050						100.0		—	—
Worth	Tex.	6,900		50.4	29.7	19.9				—	—
nd Rapids	Mich.	2,100		30.9			17.9	51.2		—	—
msboro	N. C.	81,170	97.1	0.8			2.1			13,770	1
msville	S. C.	130,759	99.3	0.7						—	—
nton	Tex.	50,678		33.8	53.7	12.5				672	1
onville	Fla.	182,449	39.2	2.7		55.4	1.3		1.4	60,269	6
as City	Mo.	115		100.0						—	—
ville	Tenn.	39,485	6.9	8.8		79.0	5.3			8,320	1
ington	Ky.	2,095		66.1				33.9		—	—
Island	N. Y.	22,355		10.1			62.7	10.7	16.5	6,225	2
ville	Ky.	4,615		68.9		31.1				—	—
an	Ga.	11,324				89.6	10.4			2,459	2
Total (page one) . .		1,617,413								328,675	60

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK SHOWING PERCENTAGE OF TOTAL SHIPMENTS BY PRODUCING PLANTS

[illegible]



RESPONDENT'S EXHIBIT NO. 79-A

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK PRODUCED
AT CHESTER, S. C. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouses
Altoona	Pa. 1,600	.3%	—	—
Atlanta	Ga. 7,355	1.2	—	—
Augusta	Ga. 18,270	3.1	—	—
Birmingham	Ala. 7,825	1.3	—	—
Bluefield	Va. 6,665	1.1	6,665	1
Charleston	S. C. 16,335	2.7	—	—
Charlotte	N. C. 49,255	8.3	2,380	1
Chattanooga	Tenn. 4,485	.8	—	—
District of Columbia	D. C. 1,890	.3	—	—
Greensboro	N. C. 78,845	13.2	13,770	1
Greenville	S. C. 129,859	21.8	—	—
Jacksonville	Fla. 71,471	12.0	30,111	1
Knoxville	Tenn. 2,725	.5	—	—
Memphis	Tenn. 800	.1	—	—
Miami	Fla. 31,675	5.3	11,010	1
Mobile	Ala. 12,675	2.1	—	—
Montgomery	Ala. 1,985	.3	—	—
New Orleans	La. 19,790	3.3	—	—
Norfolk	Va. 32,350	5.4	10,950	1
Pensacola	Fla. 1,450	.2	—	—
Richmond	Va. 12,160	2.0	5,655	1
Roanoke	Va. 27,270	4.6	11,790	1
San Antonio	Tex. 1,200	.2	—	—
Savannah	Ga. 40,880	6.9	—	—
Tampa	Fla. 6,950	1.2	1,600	1
Wilmington	N. C. 10,900	1.8	—	—
Total	596,665	100.0%	93,931	9

RESPONDENT'S EXHIBIT NO. 79-B

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK PRODUCED AT
DIXON, ILL. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouses
Albany	N. Y. 7,195	1.2	—	—
Altoona	Pa. 16,375	2.8	12,600	3
Atlanta	Ga. 1,395	.2	—	—
Baltimore	Md. 1,400	.2	—	—
Birmingham	Ala. 1,915	.3	—	—
Bluefield	Va. 63,960	11.0	11,050	3
Boston	Mass. 6,325	1.1	650	1
Buffalo	N. Y. 3,750	.6	2,900	2
Charleston	W. Va. 15,020	2.6	5,280	2
Chattanooga	Tenn. 3,300	.6	—	—
Chicago	Ill. 1,400	.2	—	—
Clarksburg	W. Va. 44,261	7.6	11,625	3
Columbus	O. 5,182	.9	1,657	—
Cumberland	Md. 24,695	4.2	5,605	—
Dallas	Tex. 1,260	.2	—	—
Des Moines	Ia. 1,525	.3	—	—
Detroit	Mich. 1,910	.3	—	—
District of Columbia	D. C. 11,360	2.0	8,010	—
Duluth	Minn. 3,170	.5	—	—
El Paso	Tex. 18,207	3.1	—	—
Erie	Pa. 2,110	.4	700	—
Fargo	N. D. 1,625	.3	—	—
Ft. Worth	Tex. 3,475	.6	—	—
Grand Rapids	Mich. 650	.1	—	—
Greensboro	N. C. 625	.1	—	—
Greenville	S. C. 900	.2	—	—
Houston	Tex. 17,140	2.9	—	—
Jacksonville	Fla. 4,950	.9	—	—
Kansas City	Mo. 115	.0	—	—
Knoxville	Tenn. 3,475	.6	—	—
Lexington	Ky. 1,385	.2	—	—
Long Island	N. Y. 2,250	.4	—	—
Louisville	Ky. 3,180	.6	—	—
Memphis	Tenn. 1,350	.2	—	—
Miami	Fla. 1,050	.2	—	—
Milwaukee	Wisc. 250	.0	—	—
Monroe	La. 1,200	.2	—	—
Montgomery	Ala. 625	.1	—	—
New Haven	Conn. 2,656	.5	620	—
New Jersey	N. J. 18,550	3.2	9,115	—
Total (Fwd.) ..	301,166	51.7	69,812	—

RESPONDENT'S EXHIBIT NO. 79-C

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
DIXON, ILL. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouses
Total (Fwd.) ..	301,166	51.7	69,812	26
New Orleans La.	8,460	1.5%	—	—
New York N. Y.	6,325	1.1	1,190	1
Norfolk Va.	21,625	3.7	3,100	1
Omaha Neb.	5,140	.9	—	—
Pensacola Fla.	690	.1	—	—
Philadelphia Pa.	49,052	8.5	23,000	3
Pittsburgh Pa.	57,525	9.9	27,285	4
Portland Me.	2,805	.5	—	—
Providence R. I.	5,320	.9	—	—
Richmond Va.	46,600	8.3	8,425	3
Roanoke Va.	41,335	7.1	3,475	1
Rochester N. Y.	1,350	.2	—	—
San Antonio Tex.	7,825	1.3	—	—
Savannah Ga.	1,775	.3	—	—
Scranton Pa.	9,855	1.7	1,990	1
Syracuse N. Y.	13,925	2.4	600	1
Total	580,773	100.0%	138,844	41

RESPONDENT'S EXHIBIT NO. 79-D

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
FT. SCOTT, KANS. PLANT

Shipments				Shipped from Reserve Warehouses	
Brokerage District		Cases	% of Total	Cases	Warehouses
Dallas	Tex.	7,188	4.9%	—	—
Denver	Colo.	6,105	4.1	—	—
El Paso	Tex.	19,396	13.1	—	—
Ft. Worth	Tex.	2,050	1.4	—	—
Houston	Tex.	27,191	18.4	—	—
Mobile	Ala.	650	.4	—	—
Monroe	La.	690	.5	—	—
New Orleans	La.	60,705	41.1	—	—
Omaha	Neb.	10,930	7.4	—	—
San Antonio	Tex.	12,150	8.2	—	—
Waco	Tex.	760	.5	—	—
Total		<u>147,815</u>	<u>100 %</u>	<u>None</u>	

RESPONDENT'S EXHIBIT NO. 79-E

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
LEWISBURG, TENN. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouse
Atlanta	Ga. 45,393	6.6%	16,122	3
Augusta	Ga. 3,666	.5	3,666	1
Birmingham	Ala. 70,490	10.3	14,725	2
Bluefield	Va. 1,200	.2	1,200	1
Chattanooga	Tenn. 36,270	5.3	9,800	1
D. Worth	Tex. 1,375	.2	—	—
Houston	Tex. 6,347	.9	672	1
Jacksonville	Fla. 101,038	14.7	27,558	4
Knoxville	Tenn. 31,185	4.5	8,320	1
Louisville	Ky. 1,435	.2	—	—
Macon	Ga. 10,149	1.5	2,459	2
Memphis	Tenn. 17,385	2.5	—	—
Miami	Fla. 31,075	4.5	19,400	4
Mobile	Ala. 52,105	7.6	17,175	2
Monroe	La. 7,260	1.1	3,510	1
Montgomery	Ala. 15,360	2.2	5,215	3
Nashville	Tenn. 8,115	1.2	—	—
New Orleans	La. 190,165	27.8	69,795	4
Pensacola	Fla. 23,710	3.5	6,245	1
San Antonio	Tex. 1,750	.3	—	—
Savannah	Ga. 19,050	2.8	17,025	4
Tampa	Fla. 10,650	1.6	3,100	2
Total	685,173	100.0%	225,987	37

RESPONDENT'S EXHIBIT NO. 79-F

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES)
OF BORDEN BRAND EVAPORATED MILK PRODUCED AT
NEW LONDON, WISC. PLANT

Shipments		% of Total	Shipped from Reserve Warehouses	
Brokerage District	Cases		Cases	Warehouses
Albany	N. Y. 19,095	3.3%	7,385	1
Altoona	Pa. 2,850	.5	—	—
Atlanta	Ga. 1,150	.2	—	—
Augusta	Ga. 1,150	.2	—	—
Baltimore	Md. 48,639	8.5	—	—
Birmingham	Ala. 1,200	.2	—	—
Bluefield	Va. 1,925	.3	—	—
Boston	Mass. 71,610	12.5	13,925	2
Buffalo	N. Y. 35,340	6.2	—	—
Chattanooga	Tenn. 725	.1	—	—
Chicago	Ill. 2,315	.4	—	—
Cumberland	Md. 1,400	.2	—	—
Denver	Colo. 1,370	.2	—	—
Dist. of Columbia	D. C. 16,750	2.9	—	—
Duluth	Minn. 680	.1	—	—
Erie	Pa. 1,390	.2	—	—
Fargo	N. D. 6,415	1.1	—	—
Grand Rapids	Mich. 375	.1	—	—
Greensboro	N. C. 1,700	.3	—	—
Jacksonville	Fla. 2,390	.4	—	—
Knoxville	Tenn. 2,100	.4	—	—
Long Island	N. Y. 14,020	2.5	4,875	1
Macon	Ga. 1,175	.2	—	—
Memphis	Tenn. 1,600	.3	—	—
Miami	Fla. 2,825	.5	—	—
Monroe	La. 750	.1	—	—
Montgomery	Ala. 665	.1	—	—
Nashville	Tenn. 1,350	.2	—	—
New Haven	Conn. 25,783	4.5	4,717	1
New Jersey	N. J. 44,775	7.8	—	—
New Orleans	La. 26,175	4.6	—	—
New York	N. Y. 96,172	16.8	12,407	1
Omaha	Neb. 1,350	.2	—	—
Philadelphia	Pa. 23,088	4.0	—	—
Pittsburgh	Pa. 2,165	.4	—	—
Portland	Me. 10,625	1.9	1,310	1
Providence	R. I. 59,950	10.4	9,050	2
Richmond	Va. 2,365	.4	—	—
Roanoke	Va. 2,540	.5	—	—
Rochester	N. Y. 9,675	1.7	3,400	1
Total (Fwd.) ..	547,617	95.2	57,069	10

RESPONDENT'S EXHIBIT NO. 79-G

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
NEW LONDON, WISC. PLANT

Shipments			Shipped from Reserve Warehouses	
Brokerage District	Cases	% of Total	Cases	Warehouses
Total (Fwd.) ..	547,617	95.2	57,069	10
Savannah Ga.	2,200	.4%	—	—
Scranton Pa.	4,103	.7	—	—
Syracuse N. Y.	16,700	2.9	5,555	1
Tampa Fla.	3,400	.6	—	—
Total ...	574,020	100.0%	62,624	11

RESPONDENT'S EXHIBIT NO. 79-H

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING
QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF
BORDEN BRAND EVAPORATED MILK PRODUCED AT
PERRINTON, MICH. PLANT

Shipments				Shipped from Reserve Warehouses	
Brokerage District		Cases	% of Total	Cases	Warehouses
Albany	N. Y.	4,317	1.9%	—	—
Altoona	Pa.	2,950	1.3	—	—
Bluefield	Va.	27,820	12.5	725	1
Boston	Mass.	5,165	2.3	1,640	1
Buffalo	N. Y.	9,070	4.1	—	—
Charleston	W. Va.	3,110	1.4	—	—
Clarksburg	W. Va.	13,355	6.0	710	1
Cleveland	O.	1,685	.8	—	—
Columbus	O.	3,505	1.6	—	—
Cumberland	Md.	9,790	4.4	2,110	1
Detroit	Mich.	4,310	1.9	—	—
Dist. of Columbia	D. C.	800	.4	—	—
Erie	Pa.	1,410	.6	—	—
Flint	Mich.	1,050	.5	—	—
Grand Rapids	Mich.	1,075	.5	—	—
Lexington	Ky.	710	.3	—	—
Long Island	N. Y.	2,400	1.1	—	—
New Haven	Conn.	2,935	1.3	2,235	1
New Jersey	N. J.	10,170	4.6	5,395	1
New York	N. Y.	10,006	4.5	—	—
Norfolk	Va.	12,250	5.5	—	—
Philadelphia	Pa.	22,121	9.9	1,600	1
Pittsburgh	Pa.	15,060	6.7	—	—
Portland	Me.	5,295	2.4	—	—
Providence	R. I.	11,205	5.0	3,030	1
Richmond	Va.	11,380	5.1	—	—
Roanoke	Va.	12,320	5.5	—	—
Rochester	N. Y.	3,375	1.5	—	—
Scranton	Pa.	2,575	1.2	1,200	1
Syracuse	N. Y.	11,465	5.2	2,170	1
Total		222,679	100.0%	20,815	10

RESPONDENT'S EXHIBIT NO. 79-1

1957 SHIPMENTS INTO BROKERAGE DISTRICTS (INCLUDING QUANTITIES SHIPPED FROM RESERVE WAREHOUSES) OF BORDEN BRAND EVAPORATED MILK PRODUCED AT WELLSBORO, PA.

Shipments		Cases	% of Total	Shipped from Reserve Warehouses	
				Cases	Warehouses
Albany	N. Y.	6,090	1.2%	3,200	1
Altoona	Pa.	24,090	4.7	12,025	1
Baltimore	Md.	82,570	15.9	17,255	1
Bluefield	Va.	4,805	.9	4,080	1
Boston	Mass.	22,630	4.4	19,320	3
Buffalo	N. Y.	58,334	11.2	16,520	1
Charleston	W. Va.	2,960	.6	1,500	1
Clarksburg	W. Va.	11,035	2.1	8,735	1
Cumberland	Md.	14,015	2.7	5,610	1
Dist. of Columbia	D. C.	10,260	2.0	5,485	1
Erie	Pa.	3,510	.7	2,100	1
Jacksonville	Fla.	2,600	.5	2,600	1
Long Island	N. Y.	3,685	.7	1,350	1
New Haven	Conn.	13,700	2.6	10,230	3
New Jersey	N. J.	25,340	4.9	15,310	2
New York	N. Y.	17,323	3.4	7,313	2
Norfolk	Va.	1,200	.2	1,200	1
Philadelphia	Pa.	43,714	8.4	14,850	2
Pittsburgh	Pa.	55,840	10.8	17,930	1
Portland	Me.	5,145	1.0	5,145	2
Providence	R. I.	19,483	3.7	16,883	3
Richmond	Va.	3,565	.7	2,855	1
Roanoke	Va.	7,730	1.5	3,610	1
Rochester	N. Y.	7,695	1.5	2,495	1
Savannah	Ga.	3,025	.6	3,025	1
Scranton	Pa.	57,286	11.1	25,220	2
Syracuse	N. Y.	10,675	2.0	2,725	1
Total		<u>518,305</u>	<u>100.0%</u>	<u>228,571</u>	<u>38</u>

RESPONDENT'S EXHIBIT NO. 80

THE BORDEN COMPANY
 1957 PRIVATE LABEL SALES (TALL SIZE BASIS)
 BY PLANT

<u>Customer</u>	<u>Percentage of Total Cases</u>	<u>Total Cases</u>	<u>Albany</u>	<u>Chester</u>	<u>Dixon</u>	<u>Fort Scott</u>	<u>Lewisburg</u>	<u>Modesto</u>	<u>New London</u>	<u>Perrinton</u>	<u>Wellsboro</u>
Biddle	25.8	284,752		149,756	917.5		111,578.5				22,500
CROG	11.4	125,970			23,400	66,958	28,311		6,700	601	
Safeway	26.4	291,725.5	68,354.5		9,668	124,303					89,400
Topco	12.8	141,950			14,391.5	42,026	34,789.5		1,306	2,506	46,931
Total	76.4	844,397.5	68,354.5	149,756	48,377	233,287	174,679		8,006	3,107	158,831
All other	23.6	260,299.5	147,812.5	1,450	1,989.5	—	11,250	89,774.5	—	—	8,023
Total	100.	1,104,697	216,167	151,206	50,366.5	233,287	185,929	89,774.5	8,006	3,107	166,854

RESPONDENT'S EXHIBIT NO. 81

THE BORDEN COMPANY

PACKAGES OF ADVERTISED BRANDS SOLD THROUGH REGULAR CHANNELS

Product	Standard Units Sold					No. of Packages Per Standard Unit	Total No. Pkgs.	Percentage of Total
	Eastern Div.	Central Div.	Southern Div.	Western Div.	Total			
Eagle	83,942.00	139,221.00	291,062.00	97,831.00	612,056.00	24	14,689,344.00	
							14,689,344.00	4.68%
Other Condensed	80,356.00	477.00	315,502.00	—	396,335.00	24	9,512,040.00	
							9,512,040.00	3.03%
B. B. Evap.								
Confectioners	5,041.50	943.00	504.00	4,015.00	10,503.50	6	63,021.00	
Tall 48	1,724,853.04	200,958.50	1,647,591.00	359,720.00	3,933,122.54	48	188,789,881.92	
Small 48 and Small 96	140,367.00	2,419.00	150,038.50	66,583.50	359,408.00	96	34,503,168.00	
Total	1,870,261.54	204,320.50	1,798,133.50	430,318.50	4,303,034.04		223,356,070.92	71.14%
Malt								
One Pound	48,843.48	77,591.75	29,770.00	38,029.50	194,224.73	12	2,330,696.76	
Five Pound	15.80	220.41	—	365.00	611.21	2.4	1,466.90	
Total	48,859.28	77,812.16	29,770.00	38,394.50	194,835.94		2,332,163.66	.74%
Stemo	10,048.00	3,963.00	13,494.00	19,570.67	47,075.67	12	564,908.04	
							564,908.04	.18%
Spiced Meat								
9 ounce	91,811.06	98,276.00	69,976.00	50,309.00	310,372.06	24	7,448,929.44	
18 ounce	87,550.17	89,921.33	31,314.00	42,618.00	251,403.50	12	3,016,842.00	
Total	179,361.23	188,197.33	101,290.00	92,927.00	561,775.56		10,465,771.44	3.33%
Stee	749,903.19	347,883.91	308,161.56	135,216.48	1,541,165.14	12	18,493,981.68	
							18,493,981.68	5.89%
Starlac								
quart	—	1.00	—	—	1.00	288	288	
1 qt and 5 qt	373,801.50	228,069.21	375,145.00	85,919.00	1,062,934.71	24	25,510,433.04	
1 qt and 12 qt	149,440.00	124,773.00	158,085.00	138,400.00	570,698.00	12	6,848,376.00	
Total	523,241.50	352,843.21	533,230.00	224,319.00	1,633,633.71		32,359,097.04	10.31%
St. Chocolate								
Syrup and 8 oz	24,095.41	4,778.25	7,622.00	10,664.35	47,160.01	24	1,131,840.24	
One pound	32,251.25	21,891.17	13,632.00	21,767.25	89,541.67	12	1,074,500.04	
Total	56,346.66	26,669.42	21,254.00	32,431.60	136,701.68		2,206,340.28	.70%
Total	3,602,319.40	1,341,387.53	3,411,897.06	1,071,008.75	9,426,612.74		313,979,717.06	100.00%

[fol. 974] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
September 29, 1964
(omitted in printing)

[fol. 975] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 20463

THE BORDEN COMPANY, Petitioner,
versus

FEDERAL TRADE COMMISSION, Respondent.

On Petition for Review of an Order of the Federal Trade
Commission

OPINION—December 4, 1964

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

HUTCHESON, Circuit Judge: This is a petition by the Borden Company to review and set aside a cease and desist order of the Federal Trade Commission¹ based upon its decision that Borden had violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), the pertinent portion of which provides:

“It shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade [fol. 976] and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of

¹ The Commission, with two members not participating and one member dissenting, entered its order with the concurrence of two of its five members.

either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . ."

The challenged order is based on the Commission's decision that Borden violated Section 2(a) by discriminating in price between purchasers of its private label evaporated milk, sold under brand labels owned by the customer, and purchasers of its Borden brand evaporated milk.

The Borden Company is engaged in the manufacture, processing, distribution and sale of food, dairy and chemical products. Since about 1938 it has been selling both Borden brand and private label evaporated milk. (The use of the term "milk" in this opinion is intended to refer only to evaporated milk.) The Borden brand, like the Carnation and Pet brands, was sold on a delivered price basis which was uniform throughout the country. The private label milk was sold by Borden on an f.o.b. plant basis, with prices determined under a cost-plus formula. In 1956 and 1957 Petitioner expanded its private label operations to its [fol. 977] two southern plants, located at Lewisburg, Tennessee, and Chester, South Carolina, which had not previously packed private label milk. As a result of these new operations some private label business which had been served by other packers shifted to Borden. This litigation ensued.

Borden has always sold its private label evaporated milk at lower prices than its Borden brand evaporated milk. The record indicates that it made no general offer to sell private label milk, nor did it solicit such orders. The customers who were supplied with the private label product approached Borden and asked it to make the private label milk available in addition to the Borden brand. These customers all continue to buy and stock the Borden brand along with their own private label brand. The private label milk which Borden sells is chemically identical to Borden

brand and is packed in the same way except that private brand labels belonging to the customer are put on the cans instead of the Borden brand labels. The private label milk is sold f.o.b. at a price determined by a cost-plus formula through which Borden adds a margin of profit to the actual cost of producing the milk at the particular plant from which it is shipped. The private label price varies from plant to plant and from month to month at each plant, but is always substantially lower than the Borden brand price which is uniform throughout the country. It is this difference in price between Borden brand milk and private label milk that the Commission attacks as price discrimination. [fol. 978] The Hearing Examiner found Borden had discriminated in price between purchasers of the Borden brand and private label milk and that such products were of like grade and quality, but he found that this practice had not injured competition and that it was not likely to injure competition, and that, in any event, the difference in price had been cost justified. He ordered the complaint dismissed, but the Commission reversed the Examiner and found potential injury in both the primary and secondary lines of competition and rejected Borden's cost justification defense. It ordered Petitioner to cease and desist from discriminating in price between competing purchasers of food products of like grade and quality.

Our initial determination must necessarily be whether or not the Commission applied the correct legal test in deciding that the commodities sold at different prices were of "like grade and quality". The facts on this element of the case are undisputed. The question is purely one of law, turning on the proper construction of the statutory phrase "of like grade and quality". If the products were not of like grade and quality, within the meaning of the Act, then their sale does not fall within the prohibition of Section 2(a). It is vigorously asserted by the Petitioner that Borden brand evaporated milk and the private label evaporated milk sold by Borden are not "commodities of like grade and quality".

The Commission's finding that Borden brand evaporated milk and the private label milk produced and sold by Bor-

den are of like grade and quality is based on the undisputed fact that the chemical content of the products is identical. [fol. 979] They are packed exactly the same except that the private label milk does not bear the Borden brand label. The private label milk bears the brand owned by the purchaser for whom it is packed. Its label does not show that the milk was packed or in any manner handled by Borden. Under the construction of the Act adopted here by the Commission the "like grade and quality" determination was based solely on the physical properties of the products without regard to the brand names they bear or the relative public acceptance enjoyed by each.

Borden contends that the grade and quality of products may vary either because of differences in "intrinsic superior quality" or because of "intense public demand" for one product as compared with another. It asserts that a sharp distinction between premium and non-premium products prevails in the evaporated milk business and that there are three well-known premium brands (Carnation, Pet, and Borden) which customarily command a substantially higher price than the other brands. It contends that private label milk, regardless of who packs it, must be sold at lower prices. Petitioner says the higher price commanded by Borden brand at all levels of distribution is due to the "intense public demand" for the product rather than to any "intrinsic superior quality". Borden puts the same milk in the private label cans as in the Borden brand cans. Chemically, the two products are the same, but Petitioner asserts, commercially, they are quite different. One is a premium product, the other nonpremium, Borden contends, and they should be priced accordingly.

[fol. 980] The record clearly establishes that Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution. Customers at the retail level are willing to pay more for it than for private label because of the Borden name.² The wholesalers who testified

² For example, one retail grocer testified as follows:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of

recognized that private label milk customarily sells at prices substantially below the premium price commanded by Borden brand milk and the other nationally advertised brands.³ That the Borden brand is recognized at the manufacturer's level as a premium product is illustrated by the fact that the wholesalers and retailers who bought private label milk from Borden at the lower prices nevertheless kept right on buying Borden brand, at the higher price, in approximately the same quantities. They, in effect, treated one as a premium line, the other as non-premium, recognizing that the Borden brand milk would command a higher price on resale than would the private label milk.

The basic issue presented here then is whether the demonstrated consumer preference for the Borden brand product [fol. 981] over the private label product is to receive legal recognition in the "like grade and quality" determination. The legislative history of the Act is of little assistance on this point. The members of the Attorney General's National Committee to Study the Antitrust Laws were divided on the question,⁴ as are the antitrust commentators.⁵ We find no case which controls our disposition of this issue.

the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them won't want anything except Pet.

"Q. They don't care what price——

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else."

³ As one wholesaler put it, "Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have \$1.50 or \$2 a case spread to make it interesting."

⁴ The majority of the Committee recommended that the economic factors inherent in brand names and national ad-

In construing the Robinson-Patman Act we are mindful of the language of the Supreme Court in *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61 (1953). The court there said the Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so to avoid "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation".⁶ Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price [fol. 982] uniformity and rigidity, in conflict with the realities of the marketplace and congressional antitrust policies. An established brand name may have a large following among purchasers. This fact can be of great economic significance in a competitive market. We do not believe it was the intention of Congress that such clearly demonstrable consumer preferences should simply be ignored in determining when products may be priced differently. As a practical matter, such preferences may be far more significant in determining the market value of a product than

vertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test, but should be taken into account in the injury to competition and cost justification provisions of the statute. The minority of the Committee urged that "significant consumer preferences" be taken into account under the like grade and quality provision, treating demonstrable economic differences as calling for evaluation under "grade" as distinct from any purely physical consideration of "quality". Report of the Attorney General's National Committee to Study the Antitrust Laws 158-159 (1955).

⁵ In accord with the view of the majority of the Committee are Patman and Austin; Austin, Price Discrimination Under the Robinson-Patman Act, 39 (1959); Patman, Complete Guide to the Robinson-Patman Act, 23, 35 (1936). Rowe is of a contrary opinion. Rowe, Price Discrimination Under the Robinson-Patman Act, 76 (1962).

⁶ 346 U.S. 61, 63, 74.

are its physical characteristics. It is both proper and consistent with the broad antitrust policy of Congress that they be given recognition under the "like grade and quality" test of the Act. In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional.

The Commission relies primarily upon this Court's opinion in *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F (2) 916 (5th Cir. 1962), a treble damage action in which we upheld the sufficiency of the charge in a complaint that the respondent discriminated in price by selling its nationally advertised liquors at one price while selling identical liquors under different labels to a favored customer at a lower price. That decision clearly does not control this case. The complaint which we upheld there affirmatively alleged that the products, although labeled differently were sold "upon the express representation that [the lower priced liquors] were in reality higher priced nationally advertised brands . . . packaged and labeled [fol. 983] under different trade names". The label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. In the present case, by contrast, the private label customers were forbidden to make any use of the Borden name in selling the private label milk and, so far as the record disclosed, they never represented the private brands to be Borden products. In this case, the brand name had commercial significance. Whatever significance the brand names might have had in *Hartley & Parker*, absent the seller's representation that the differently labeled products were the same was nullified by that representation.

We do not find the administrative precedents urged upon us by the Commission applicable to this case.⁷ Although

⁷ The Commission relies upon its line of decisions holding that goods which are the same in all respects except labels are of like grade and quality for the purposes of Section 2. *Page Dairy Co.*, 50 F.T.C. 395 (1953); *United States Rubber Co.*, 46 F.T.C. 998 (1950); *United States Rubber Co., et al.*,

it is true that these administrative decisions all treated goods of differing brands as being of like grade and quality, they are, however, clearly distinguishable from this case. In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden brand label was clearly of commercial significance. At all levels of distribution it imparted a [fol. 984] premium market value to the Borden product which the private label product did not enjoy. That the Borden brand product should sell for a higher price than the lesser known private brands came as no surprise to anyone.

The Commission precedent would be of some weight if we were here holding that the mere affixing of different labels to physically identical products is sufficient to make them different in grade, but we do not so hold. It is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product. Different labels may be of no economic significance whatsoever. However, where it is demonstrated that a label enjoys a significant consumer acceptance such that buyers are willing to pay more for the product which bears that brand, then it is clearly of commercial significance in the most direct and obvious way—namely, it causes the product to sell for a consistently higher price in a competitive market. That is not to say that merely attaching different, but comparable brand labels to two products will, without more, make them of unlike “grade”. Such an artificial distinction, unaccompanied by any significant difference in the public acceptance of the two brands would provide an easy means of evading the Act. A manufacturer would be free to discriminate in price between purchasers

28 F.T.C. 1489 (1939); *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), reversed on other grounds 101 F(2) 620 (6th Cir. 1939).

merely by affixing comparable, but different, private labels to the goods sold to each of them. We do not countenance such a practice, but merely recognize the demonstrated commercial significance of the Borden brand here, as com-[fol. 985] pared to the private label brands.⁸ The record shows that identification with the Borden Company through its brand name has value in the evaporated milk market. That value has been clearly proven by Borden in this case and it should be allowed to take it into account in pricing its products.

The Commission precedents which are more analogous to this case are those involving the closely related "meeting competition" defense under Section 2(b). There the Commission has given full recognition to the significance of the higher prices commanded by premium products in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it.⁹ The

⁸ As pointed out by the Second Circuit in *Atlanta Trading Corp. v. F.T.C.*, 258 F(2) 365 (2nd Cir. 1958), "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded". In setting the Commission's order aside the Court held that certain pork products were not of like grade and quality, pointing out, among other things, that the Commission had failed to take account of the prices at which the products sold.

⁹ As the Commission stated in *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957), "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the produce at a higher price in a normal market".

Similarly in *Standard Oil Co.*, 49 F.T.C. 923 (1953) the Commission stated, "There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade or quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline public acceptance rather than chemi-

[fol. 986] most recent example is *Callaway Mills Co.*, 3 Trade Reg. Rep. Ph. 16800 (F.T.C. Feb. 10, 1964) where the Commission rejected the seller's meeting competition defense on the ground that it had failed to prove that its carpeting was "similar in grade and quality" to that of the competitor's whose prices it was meeting. The Commission stated that:

"Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods".

The Commission apparently assigned to the "grade" concept the public demand or salability characteristics of a product and to the "quality" concept its intrinsic or physical characteristics. This approach cuts both ways. If it is appropriate in considering the grade and quality of products for purposes of Section 2(b), it is equally applicable to that determination under Section 2(a). We cannot approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case. The ambiguities of the Robinson-Patman Act are troublesome enough without further muddying the water through inconsistent administrative determinations dealing with important questions of law. Ultimately it is the Court which has the duty to decide such questions. As Justice Brandeis wrote, concurring in *St Joseph Stock Yards v. United States*, 298 U.S. 38, 84 (1936), "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous [fol. 987] rule of law was applied and whether the proceedings in which facts were adjudicated was conducted regu-

cal analysis of the product is the important competitive factor."

See also *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, rev'd on other grounds, 191 F(2) 786 (7th Cir., 1951), cert. dismissed, 344 U.S. 206 (1952).

larly." See also *United States v. Morgan*, 307 U.S. 183, 191 (1939).

Since the Commission's erroneous determination that the products were of like grade and quality was an essential element of its cease and desist order, the petition to set aside the order is granted. We do not render any decision on the other questions presented in the case. The Petitioner's arguments concerning injury to competition and its cost justification defense seems to have considerable merit, but we do not pass on them here. The holding that the products were not of like grade and quality requires us to set aside the Commission's order and make it unnecessary for us to consider the other points raised.

Petition to set aside the cease and desist order is

Granted.

[fol. 988] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

October Term, 1964

No. 20463

THE BORDEN COMPANY, Petitioner,

VERSUS

FEDERAL TRADE COMMISSION, Respondent.

On Petition for Review of an Order of the Federal Trade
Commission

Before HUTCHESON, RIVES and BROWN, Circuit Judges.

JUDGMENT—December 4, 1964

This cause came to be heard on the petition of The Borden Company, for review of an Order of the Federal Trade Commission issued on January 30, 1963, in Docket No. 7129, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjusted and decreed by this Court that the petition to set aside the cease and desist order in this cause be and the same is hereby, granted.

Issued as Mandate: Dec. 30, 1964.

[fol. 989] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 990] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1964

No.

FEDERAL TRADE COMMISSION, Petitioner,

vs.

THE BORDEN COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—March 4, 1965

Upon Consideration of the application of counsel for
petitioner(/s),

It Is Ordered that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including May 3rd, 1965.

Hugo L. Black, Associate Justice of the Supreme
Court of the United States.

Dated this 4th day of March, 1965.

[fol. 991] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, Petitioner,

v.

THE BORDEN COMPANY

ORDER ALLOWING CERTIORARI—October 11, 1965.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	2
Question presented.....	2
Statute involved.....	2
Statement.....	3
Reasons for granting the writ.....	7
Conclusion.....	18
Appendix A.....	19
Appendix B.....	31

CITATIONS

Cases:

<i>Anheuser-Busch, Inc.</i> , 54 F.T.C. 277.....	15
<i>Federal Trade Commission v. Anheuser-Busch, Inc.</i> , 363 U.S. 536.....	17
<i>Federal Trade Commission v. Henry Broch & Co.</i> , 363 U.S. 166.....	8
<i>Federal Trade Commission v. Cement Institute</i> , 333 U.S. 683.....	8
<i>Federal Trade Commission v. Mandel Brothers, Inc.</i> , 359 U.S. 385.....	12
<i>Goodyear Tire & Rubber Company, The</i> , 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620.....	11, 12
<i>Hansen Inoculator Co., Inc.</i> , 26 F.T.C. 303..	12
<i>Hartley & Parker, Inc. v. Florida Beverage Corp.</i> , 307 F. 2d 916.....	14
<i>International Salt Co.</i> , 49 F.T.C. 138.....	12
<i>Page Dairy Co.</i> , 50 F.T.C. 395.....	12
<i>United States Rubber Co.</i> , 28 F.T.C. 1489.....	12
<i>United States Rubber Co.</i> , 46 F.T.C. 998.....	12
<i>United States v. American Trucking Ass'ns.</i> , 310 U.S. 534.....	13

Cases—Continued

	Page
<i>Whitaker Cable Corp.</i> , 51 F.T.C. 958, affirmed 239 F. 2d 253.....	12
Statutes:	
Clayton Act, Section 2, 38 Stat. 730, as amend- ed by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13:	
Sec. 2(a).....	2, 3, 7, 15, 16, 17
Sec. 2(b).....	15
Federal Trade Commission Act, section 5, 38 Stat. 719.....	17
Congressional material:	
80 Cong. Rec. 8115.....	9
Hearings on H.R. 4995 Before the House Com- mittee on the Judiciary, 74th Cong., 1st and 2d Sess.....	10, 11
H. Rep. 2287, 74th Cong., 2d Sess., p. 4.....	11
Miscellaneous:	
35 <i>Advertising Age</i> , December 21, 1964, pp. 1, 16.....	16
Austin, <i>Price Discrimination and Related Problems under the Robinson Patman Act</i> , 39..	13
Cassady & Grether, <i>The Proper Interpretation of "Like Grade and Quality" within the mean- ing of Section 2(a) of the Robinson-Patman Act</i> , 30 So. Calif. L. Rev. 241.....	13
Edwards, <i>Price Discrimination Law, The</i> , 31, 463-464.....	13
Patman, <i>Robinson-Patman Act, The</i> , 27.....	13
<i>Report of the Attorney General's National Com- mittee to Study the Antitrust Laws</i> , 158.....	13
Rowe, <i>Price Discrimination under the Robinson- Patman Act</i> , 76.....	13
Seidman, <i>Price Discrimination Cases</i> , reprinted in 2 Hoffmann's <i>Antitrust Laws and Tech- niques</i> , 409.....	13

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE BORDEN COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on December 4, 1964.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 19-30) is reported at 339 F. 2d 133. The opinion of the Federal Trade Commission (R. 98-128)¹ is not yet officially reported. The initial decision and order of the hearing examiner are printed at R. 13-97.

¹ "R." refers to the printed record in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964 (App. B, *infra*, p. 31). On March 4, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(a) of the Clayton Act, as amended, prohibits certain kinds of discrimination in price involving "commodities of like grade and quality". The question presented is whether products identical in all other respects become of different "grade and quality" when sold under a private brand name instead of the manufacturer's advertised name and label.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a) provides in pertinent part:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where

the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

STATEMENT

The Federal Trade Commission issued a complaint in 1958 charging the respondent with price discrimination in selling evaporated milk in violation of Section 2(a) of the Clayton Act, as amended. The Commission alleged that respondent sold the identical evaporated milk under private brand labels at lower prices than it sold its "Borden" brand milk; and that the effect of such ^cprice discriminations may be substantially to lessen competition with Borden's own competitors ("primary line injury"), and with competitors of Borden's favored purchasers ("secondary line injury") (R. 1-5).

After full administrative proceedings, the Commission held that the respondent had violated Section 2(a) as charged, and entered a cease-and-desist order (R. 98-128).² Following its prior decisions that "goods which are the same in all respects except labels are * * * goods of like grade and quality" (R. 101-102), the Commission ruled that since the Borden brand and the private brands of evaporated milk were

² Commissioner Elman dissented without opinion, and Commissioners Anderson and Higginbotham did not participate (R. 128).

"physically * * * alike" (R. 100-101),³ they were "commodities of like grade and quality" within the meaning of Section 2(a). The Commission further found that the price differentials constituted "discrimination" (R. 105-106), that the discriminations threatened competitive injury in both the primary and secondary lines (R. 106-120), and that they were not cost justified (R. 126).⁴

In finding injury to competition in the primary line (competitors of Borden), the Commission pointed out that the evaporated milk industry has suffered a decline in sales (R. 107); that since 1950 at least ten concerns, mostly in the Midwest market area involved

³ The Commission found (R. 79-80) that "there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices."

⁴ The examiner had held that the Borden brand and the private brands were of like grade and quality and that the price differentials constituted discriminations (R. 21-22, 31). He further held, however, that the discriminations did not result in competitive injury at either line of competition (R. 50, 57) and that in any event the discriminations were cost justified (R. 74). He therefore recommended that the complaint be dismissed (R. 74). The Commission vacated the examiner's decision and issued its own findings and conclusions (R. 128, 76-96).

in the case, have discontinued production of evaporated milk and that no new concerns are coming into the business (R. 115, 107-108); that because of the competitive situation between respondent and its competitors in the Midwest market area, "little is needed to shift the competitive balance" (R. 115); that, in contrast to its competitors, the respondent is "a large and powerful concern" (R. 114); and that respondent entered the market using "a discriminatory pricing structure" which "put a severe strain on the smaller competitors," at least one of which went out of business as a result and all of which permanently lost "large and important" accounts to respondent (R. 115, 111). The Commission concluded (R. 115) that "[i]n this market setting, respondent's price discrimination is a clear threat to the entire competition provided by the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely."

The Commission's finding that respondent's price discriminations also injured competition in the secondary line (competitors of the Borden customers who received the lower prices) rested on testimony that retailers and wholesalers who purchased the Borden brand would have bought the substantially-lower-priced private brand if it had been made available to them; and that, because of "the extremely low or non-existent profit margins on evaporated milk" (R. 117), the unavailability of this lower-priced product subjected them to a substantial competitive disadvantage (R. 116-120; see R. 741-743).

The court of appeals set aside the Commission's order. It held that although the products sold under the Borden brand and under the private labels had the same "physical properties," the products were not of "like grade and quality" because the "Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution" (App. A, *infra*, pp. 22, 23). The court stated that the issue "is purely one of law, turning on the proper construction of the statutory phrase 'of like grade and quality,' " namely, "whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination" (*id.*, pp. 22, 24). It ruled (*id.*, p. 26) that "[i]n determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional"; and that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden Company through its brand name" (*id.*, p. 28). In view of its ruling on the statutory issue the court found it unnecessary to consider any of the other questions in the case (*id.*, p. 30). By the same token, only that single statutory question is presented here.

REASONS FOR GRANTING THE WRIT

This case presents an important question of statutory interpretation involving the authority of the Federal Trade Commission to deal with price discriminations resulting from the sale of the same product under different labels to different customers at different prices. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits certain price discrimination between different purchasers of "commodities of like grade and quality." The court of appeals held that physically-identical commodities cease to be of "like grade and quality" if the seller can obtain a higher price when it markets them under its own brand than when it sells them under private brand names. This interpretation of the statute distorts the meaning and intent of its language, is contradicted by its legislative history, and is contrary to the agency's settled administrative interpretation. It would seriously handicap the Commission in enforcing the statute against one of the major evils which Congress sought to reach. In the circumstances, review by this Court is required.

1. (a) As a matter of simple English usage, the "grade and quality" of a commodity refer to its physical and chemical properties, not to the price at which it is sold. While consumer preference may increase the importance of only slight differences in grade and quality, it cannot create such differences when the grade and quality are in fact identical. Two cans of

milk containing the identical product are of like grade and quality regardless of what labels they bear or how much consumers are willing to pay for them.

(b) That Congress used the words "like grade and quality" with their normal reference to the physical characteristics of goods, and not their selling price, is confirmed by the basic purpose and plan of the statute, and also its legislative history. "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained *discriminatory preferences* over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission v. Henry Brock & Co.*, 363 U.S. 166, 168, emphasis added). "[D]iscrimination in price" means "selling *the same kind of goods* cheaper to one purchaser than to another" (*Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 721, emphasis added). The obvious purpose of the "like grade and quality" requirement was to make it clear that a seller still retained the right to charge different prices for different products.

Sellers traditionally have attempted to persuade customers to pay more for a different product because it is better, *i.e.*, because it has qualities or characteristics that make it superior and therefore worth more. As a corollary, products that do not have those alleged advantages frequently are sold for less. Permitting a seller to give a lower price on a different product—one that was not of "like grade and quality"—did not

pose any threat to competitive injury which concerned Congress. What Congress was worried about in 1936 was the injury to competition that resulted when large buyers, principally the chain stores, paid less for the same product than their small competitors. For such preferences could give the large buyer a decisive advantage in selling the product in competition with smaller stores that did not receive such favored treatment. But in dealing with that problem, Congress explicitly did not prohibit a seller from charging less for a different product; it barred only discriminations in price with respect to "commodities of like grade and quality."

(c) The legislative history shows that Congress was aware of the use by chain stores of private brands as a means of gaining an unfair competitive advantage, and that it intended to prohibit sellers from discriminating in the prices at which they sold the same product, whether they sold it under the same brand or under different brands. Thus, during the debate in the House, Representative Patman, one of the sponsors of the legislation, explained that differences in brand were irrelevant in determining whether goods were "of like grade and quality" (80 Cong. Rec. 8115, emphasis added):

Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for

particular chain stores. Is there anything in this bill calculated to remedy that situation?

MR. PATMAN. * * * I have not time to discuss that feature, but the bill will protect the independents in that way, because *they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package*, and this will remedy the situation to which the gentleman refers.

MR. TAYLOR of South Carolina. *Irrespective of the brand.*

MR. PATMAN. *Yes; so long as it is the same quality.* * * *

Indeed, the House Committee rejected a proposed amendment that would have limited the Act to price discriminations with respect to commodities of "like grade and quality and brands." Hearings on H.R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421. Mr. Teegarden, counsel to the United States Wholesale Grocers' Association and generally regarded as the author of the Act (Hearings, *supra*, 1st Sess., p. 9), strongly objected to the proposal. In a letter to the Committee, he stated (*id.*, 2d sess., at 469):

To amend the bill by inserting "and brands", after the words "commodities of like grade and quality", as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same

brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A & P private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed.

The House Committee report cited with approval the Commission's decision in *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6), where the Commission had held that Goodyear violated Section 2(a) by selling to Sears Roebuck & Co. under the latter's private brands the same tires that it sold at higher prices under its own brands. H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4; and see the numerous references to the *Goodyear* case during the hearings (House Hearings, *supra*, pp. 337, 355, 472, 473). Although that case was decided under Section 2 as it read prior to

the Robinson-Patman Act,⁵ the earlier statute had a similar provision relating to "grade" and "quality," and in approving the case the Committee obviously meant to make it clear that commodities that were otherwise of "like grade and quality" did not cease to be so because the manufacturer sold them at a higher price under its own brand than under private brands.

(d) The holding below that physically-identical goods are not of "like grade and quality" if they are sold at a higher price under one brand than another is contrary to the Commission's well-settled administrative interpretation. The Commission repeatedly has treated physically identical goods as of "like grade and quality" despite the fact that they might be sold at different prices under different labels. *Whitaker Cable Corp.*, 51 F.T.C. 958, 973-975, affirmed, 239 F. 2d 253 (C.A. 7); *Page Dairy Co.*, 50 F.T.C. 395; *United States Rubber Co.*, 46 F.T.C. 998; *United States Rubber Co.*, 28 F.T.C. 1489; *Hansen Inoculator Co., Inc.*, 26 F.T.C. 303; cf. *International Salt Co.*, 49 F.T.C. 138; see, also, *The Goodyear Tire & Rubber Co.*, *supra*. "This contemporaneous construction is entitled to great weight * * *" (*Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 391;

⁵ In the original Clayton Act, Section 2 broadly prohibited discriminations in price that threatened competitive injury. A proviso permitted price discriminations "on account of differences in the grade, quality, or quantity of the commodity sold * * *." 38 Stat. 730.

see *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 549).⁶

The court of appeals, although recognizing that these Commission decisions "all treated goods of differing brands as being of like grade and quality," distinguished them on the following ground (App. A, *infra*, p. 27):

* * * In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden brand label was clearly of commercial significance. At all levels of distribution it im-

⁶ The Attorney General's National Committee to Study the Antitrust Laws approved "the Federal Trade Commission's policy of ignoring brands and trade names in determining what are 'goods of like grade and quality' under the Act." Report, p. 158. Although some members of the Committee dissented, the majority concluded that "the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test" (*ibid.*). A number of commentators similarly have approved the Commission's interpretation of the Act. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, 39 (2d ed., 1959); Patman, *The Robinson-Patman Act*, 27 (1938); Edwards, *The Price Discrimination Law*, 31, 463-464 (1959); Seidman, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Laws and Techniques*, 409, 424-428 (1963). Contra, Rowe, *Price Discrimination under the Robinson-Patman Act*, 76 (1962); Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

parted a premium market value to the Borden product which the private label product did not enjoy.

This was the same ground on which the court distinguished its own decision in *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F. 2d 916, 923, a private treble damage action in which it held that nationally advertised brands of vodka and whiskey were of "like grade and quality" with the same liquors that were sold under private labels.⁷

But if, as we have shown, the statutory standard of "like grade and quality" refers to the organic properties of a product and not to the brands or labels under which it is sold, it is immaterial whether a particular brand name is of "commercial significance" in the sense that consumers are willing to pay more for it than for another brand. Goods that in fact are of "like grade and quality" even though sold under different brands do not cease to be alike because the particular brand has been so effectively advertised and promoted that it can command a higher price in the marketplace. In short, in determining whether commodities are of "like grade and quality," the inquiry is whether the two products are physically and organically the same, not whether they are sold at different prices.

⁷ The court stated (App. A, *infra*, p. 26) that since in *Hartley & Parker* the seller had stated that the lower priced private brands were the same liquors as the higher priced nationally advertised brands, "[t]he label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. * * * In this case, the brand name had commercial significance."

(e) The court of appeals also concluded (App. A, *infra*, pp. 28-30) that the Commission's position on the "like grade and quality" issue under Section 2(a) is inconsistent with its position on the "meeting competition" defense which Section 2(b) provides. The latter section permits a seller to rebut a *prima facie* case of unlawful price discrimination by showing that the lower price "was made in good faith to meet an equally low price of a competitor." The Commission has held that a seller whose product ordinarily sells at a premium price cannot justify reducing his price to the level of the non-premium product, because he is not "meeting" but rather is "beating" his competitor's price. See, *e.g.*, *Anheuser-Busch, Inc.*, 54 F.T.C. 277.

There is, however, no inconsistency between the Commission's position on the two issues. In passing upon a seller's meeting-competition defense, the Commission must decide whether the discrimination was made "in good faith" to meet a competitor's equally low price, or whether it was a predatory anti-competitive act. Where a particular brand in fact is able to command a premium price, the fact that the seller discriminatorily drops his price to that of the non-premium item indicates that he is not merely taking a defensive step to keep a customer. For by hypothesis the customer will pay more for the premium than for the non-premium brand, and the offer of the latter at its usual lower price cannot be viewed as a competitive threat to the market of the premium brand. But to recognize that the existence of a consumer prefer-

ence for a particular brand that is reflected in a higher price is relevant in determining whether a reduction in price to the level of the non-preferred brand is made in good faith, is in no way inconsistent with holding that, under the different standard in Section 2(a), the fact that a particular brand can command a higher price does not give the product a different "grade and quality."

2. The decision of the court of appeals, if allowed to stand, will seriously handicap the Commission in enforcing the statute. For the effect of the holding below that identical goods cease to be of "like grade and quality" if part of them are sold under a particular brand name that has "commercial significance" (App. A, *infra*, p. 27) in the sense that customers will pay more for the brand, is to insulate from the statute's prohibitions a vast category of price discriminations in favor of the large chain stores that market their own private brands. As we have noted (*supra*, pp. 9-12), Congress was aware that price discriminations based on private brands were a means by which large purchasers could and did gain a significant advantage over their smaller competitors. The decision below, however, makes the statute inapplicable as a matter of law to most of those discriminations, and without regard to how serious a threat to competition they may pose.⁸ A decision with such far-reaching consequences should be reviewed by this Court.

⁸ One trade publication has described the legal consequences of the court of appeals' decision as "revolutionary." 35 *Advertising Age*, December 21, 1964, pp. 1, 16.

3. As the case comes to this Court, it does not require consideration or determination of the broader issue of the circumstances under which Section 2(a) prohibits a seller from charging less for the same goods when sold under a private brand than under its own brand name.⁹ We are requesting the Court to review only the court of appeals' ruling on the "like grade and quality" issue—a ruling which removes the entire subject matter from the Commission's jurisdiction and which properly may be reviewed without inquiry into those broader issues. The resolution of the latter turns upon the questions which the court of appeals did not reach, *i.e.*, whether the price discriminations had the requisite anticompetitive effect, and, if so, whether they were cost justified. If the Court grants the petition and reverses the ruling below on the threshold statutory question, it will be necessary to remand the case to the court of appeals for it to decide the remaining issues, as in *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542.

⁹ We are not suggesting that the Commission could not also deal with this problem under Section 5 of the Federal Trade Commission Act. In the present case, however, the Commission elected to proceed under the narrower provisions of the Clayton Act, which specifically deal with price discrimination.

CONCLUSION

The decision below is inconsistent with the words of the statute, the legislative history and the long-standing administrative construction of the Federal Trade Commission, and presents a novel question of statutory construction which is of general public importance. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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MAY 1965.

APPENDIX A

[Federal Trade Commission Docket 7129]

In the United States Court of Appeals for the Fifth
Circuit

No. 20463

THE BORDEN COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

*On Petition for Review of an Order of the Federal
Trade Commission*

(December 4, 1964)

Before HUTCHESON, RIVES and BROWN, Circuit
Judges.

HUTCHESON, Circuit Judge: This is a petition by the Borden Company to review and set aside a cease and desist order of the Federal Trade Commission¹ based upon its decision that Borden had violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), the pertinent portion of which provides:

¹ The Commission, with two members not participating and one member dissenting, entered its order with the concurrence of two of its five members.

"It shall be unlawful * * * to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

The challenged order is based on the Commission's decision that Borden violated Section 2(a) by discriminating in price between purchasers of its private label evaporated milk, sold under brand labels owned by the customer, and purchasers of its Borden brand evaporated milk.

The Borden Company is engaged in the manufacture, processing, distribution and sale of food, dairy and chemical products. Since about 1938 it has been selling both Borden brand and private label evaporated milk. (The use of the term "milk" in this opinion is intended to refer only to evaporated milk.) The Borden brand, like the Carnation and Pet brands, was sold on a delivered price basis which was uniform throughout the country. The private label milk was sold by Borden on an f.o.b. plant basis, with prices determined under a cost-plus formula. In 1956 and 1957 Petitioner expanded its private label operations to its two southern plants, located at Lewisburg, Tennessee, and Chester, South Carolina, which had not previously packed private label milk. As a result of these new operations some private label business

which had been served by other packers shifted to Borden. This litigation ensued.

Borden has always sold its private label evaporated milk at lower prices than its Borden brand evaporated milk. The record indicates that it made no general offer to sell private label milk, nor did it solicit such orders. The customers who were supplied with the private label product approached Borden and asked it to make the private label milk available in addition to the Borden brand. These customers all continue to buy and stock the Borden brand along with their own private label brand. The private label milk which Borden sells is chemically identical to Borden brand and is packed in the same way except that private brand labels belonging to the customer are put on the cans instead of the Borden brand labels. The private label milk is sold f.o.b. at a price determined by a cost-plus formula through which Borden adds a margin of profit to the actual cost of producing the milk at the particular plant from which it is shipped. The private label price varies from plant to plant and from month to month at each plant, but is always substantially lower than the Borden brand price which is uniform throughout the country. It is this difference in price between Borden brand milk and private label milk that the Commission attacks as price discrimination.

The Hearing Examiner found Borden had discriminated in price between purchasers of the Borden brand and private label milk and that such products were of like grade and quality, but he found that this practice had not injured competition and that it was not likely to injure competition, and that, in any event, the difference in price had been cost justified. He ordered the complaint dismissed, but the Commission reversed the Examiner and found potential in-

jury in both the primary and secondary lines of competition and rejected Borden's cost justification defense. It ordered Petitioner to cease and desist from discriminating in price between competing purchasers of food products of like grade and quality.

Our initial determination must necessarily be whether or not the Commission applied the correct legal test in deciding that the commodities sold at different prices were of "like grade and quality". The facts on this element of the case are undisputed. The question is purely one of law, turning on the proper construction of the statutory phrase "of like grade and quality". If the products were not of like grade and quality, within the meaning of the Act, then their sale does not fall within the prohibition of Section 2(a). It is vigorously asserted by the Petitioner that Borden brand evaporated milk and the private label evaporated milk sold by Borden are not "commodities of like grade and quality".

The Commission's finding that Borden brand evaporated milk and the private label milk produced and sold by Borden are of like grade and quality is based on the undisputed fact that the chemical content of the products is identical. They are packed exactly the same except that the private label milk does not bear the Borden brand label. The private label milk bears the brand owned by the purchaser for whom it is packed. Its label does not show that the milk was packed or in any manner handled by Borden. Under the construction of the Act adopted here by the Commission the "like grade and quality" determination was based solely on the physical properties of the products without regard to the brand names they bear or the relative public acceptance enjoyed by each.

Borden contends that the grade and quality of products may vary either because of differences in "intrinsic superior quality" or because of "intense public demand" for one product as compared with another. It asserts that a sharp distinction between premium and non-premium products prevails in the evaporated milk business and that there are three well-known premium brands (Carnation, Pet, and Borden) which customarily command a substantially higher price than the other brands. It contends that private label milk, regardless of who packs it, must be sold at lower prices. Petitioner says the higher price commanded by Borden brand at all levels of distribution is due to the "intense public demand" for the product rather than to any "intrinsic superior quality". Borden puts the same milk in the private label cans as in the Borden brand cans. Chemically, the two products are the same, but Petitioner asserts, commercially, they are quite different. One is a premium product, the other non-premium, Borden contends, and they should be priced accordingly.

The record clearly establishes that Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution. Customers at the retail level are willing to pay more for it than for private label because of the Borden name.²

² For example, one retail grocer testified as follows:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them won't want anything except Pet.

"Q. They don't care what price——

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else."

The wholesalers who testified recognized that private label milk customarily sells at prices substantially below the premium price commanded by Borden brand milk and the other nationally advertised brands.³ That the Borden brand is recognized at the manufacturer's level as a premium product is illustrated by the fact that the wholesalers and retailers who bought private label milk from Borden at the lower prices nevertheless kept right on buying Borden brand, at the higher price, in approximately the same quantities. They, in effect, treated one as a premium line, the other as non-premium, recognizing that the Borden brand milk would command a higher price on resale than would the private label milk.

The basic issue presented here then is whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the "like grade and quality" determination. The legislative history of the Act is of little assistance on this point. The members of the Attorney General's National Committee to Study the Antitrust Laws were divided on the question,⁴

³ As one wholesaler put it, "Private label merchandise is no good for nobody unless there is a price on it. * * * In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] * * * frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. * * * It has got to have \$1.50 or \$2 a case spread to make it interesting."

⁴ The majority of the Committee recommended that the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test, but should be taken into account in the injury to competition and cost justification provisions of the statute. The minority of the Committee urged that "significant consumer preferences" be taken into account under the like grade and quality provision, treating demon-

as are the antitrust commentators.⁵ We find no case which controls our disposition of this issue.

In construing the Robinson-Patman Act we are mindful of the language of the Supreme Court in *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61 (1953). The court there said the Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so to avoid "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation".⁶ Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price uniformity and rigidity, in conflict with the realities of the marketplace and congressional antitrust policies. An established brand name may have a large following among purchasers. This fact can be of great economic significance in a competitive market. We do not believe it was the intention of Congress that such clearly demonstrable consumer preferences should simply be ignored in determining when products may be priced differently. As a practical matter, such preferences may be far more significant in determining the market value of a product than are its physical characteristics. It is both proper and consist-

strable economic differences as calling for evaluation under "grade" as distinct from any purely physical consideration of "quality". Report of the Attorney General's National Committee to Study the Antitrust Laws 158-159 (1955).

⁵ In accord with the view of the majority of the Committee are Patman and Austin: Austin, Price Discrimination Under the Robinson-Patman Act, 39 (1959); Patman, Complete Guide to the Robinson-Patman Act, 23, 35 (1936). Rowe is of a contrary opinion. Rowe, Price Discrimination Under the Robinson-Patman Act, 76 (1962).

⁶ 346 U.S. 61, 63, 74.

ent with the broad antitrust policy of Congress that they be given recognition under the "like grade and quality" test of the Act. In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional.

The Commission relies primarily upon this Court's opinion in *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F(2) 916 (5th Cir. 1962), a treble damage action in which we upheld the sufficiency of the charge in a complaint that the respondent discriminated in price by selling its nationally advertised liquors at one price while selling identical liquors under different labels to a favored customer at a lower price. That decision clearly does not control this case. The complaint which we upheld there affirmatively alleged that the products, although labeled differently were sold "upon the express representation that [the lower priced liquors] were in reality higher priced nationally advertised brands * * * packaged and labeled under different trade names". The label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. In the present case, by contrast, the private label customers were forbidden to make any use of the Borden name in selling the private label milk and, so far as the record disclosed, they never represented the private brands to be Borden products. In this case, the brand name had commercial significance. Whatever significance the brand names might have had in *Hartley & Parker*, absent the seller's representation that the differently labeled products were the same was nullified by that representation.

We do not find the administrative precedents urged upon us by the Commission applicable to this case.⁷ Although it is true that these administrative decisions all treated goods of differing brands as being of like grade and quality, they are, however, clearly distinguishable from this case. In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden brand label was clearly of commercial significance. At all levels of distribution it imparted a premium market value to the Borden product which the private label product did not enjoy. That the Borden brand product should sell for a higher price than the lesser known private brands came as no surprise to anyone.

The Commission precedent would be of some weight if we were here holding that the mere affixing of different labels to physically identical products is sufficient to make them different in grade, but we do not so hold. It is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product. Different labels may be of no economic significance whatsoever. However, where it is demonstrated that a label enjoys a

⁷ The Commission relies upon its line of decisions holding that goods which are the same in all respects except labels are of like grade and quality for the purposes of Section 2. *Page Dairy Co.*, 50 F.T.C. 395 (1953); *United States Rubber Co.*, 46 F.T.C. 998 (1950); *United States Rubber Co., et al.*, 28 F.T.C. 1489 (1939); *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), reversed on other grounds 101 F. (2) 620 (6th Cir. 1939).

significant consumer acceptance such that buyers are willing to pay more for the product which bears that brand, then it is clearly of commercial significance in the most direct and obvious way—namely, it causes the product to sell for a consistently higher price in a competitive market. That is not to say that merely attaching different, but comparable brand labels to two products will, without more, make them of unlike “grade”. Such an artificial distinction, unaccompanied by any significant difference in the public acceptance of the two brands would provide an easy means of evading the Act. A manufacturer would be free to discriminate in price between purchasers merely by affixing comparable, but different, private labels to the goods sold to each of them. We do not countenance such a practice, but merely recognize the demonstrated commercial significance of the Borden brand here, as compared to the private label brands.* The record shows that identification with the Borden Company through its brand name has value in the evaporated milk market. That value has been clearly proven by Borden in this case and it should be allowed to take it into account in pricing its products.

The Commission precedents which are more analogous to this case are those involving the closely related “meeting competition” defense under Section 2(b).

* As pointed out by the Second Circuit in *Atlanta Trading Corp. v. F.T.C.*, 258 F. (2) 365 (2nd Cir. 1958), “The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier’s making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded”. In setting the Commission’s order aside the Court held that certain pork products were not of like grade and quality, pointing out, among other things, that the Commission had failed to take account of the prices at which the products sold.

There the Commission has given full recognition to the significance of the higher prices commanded by premium products in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it." The most recent example is *Callaway Mills Co.*, 3 Trade Reg. Rep. Ph. 16800 (F.T.C. Feb. 10, 1964) where the Commission rejected the seller's meeting competition defense on the ground that it had failed to prove that its carpeting was "similar in grade and quality" to that of the competitor's whose prices it was meeting. The Commission stated that:

"Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods".

The Commission apparently assigned to the "grade" concept the public demand or salability characteristics

⁹ As the Commission stated in *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957), "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the produce at a higher price in a normal market".

Similarly in *Standard Oil Co.*, 49 F.T.C. 923 (1953) the Commission stated, "There was no evidence as to whether or not Fleet Wing gasoline was of comparable grade or quality with respondent's gasoline. Regardless of this, in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor."

See also *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, rev'd on other grounds, 191 F. (2) 786 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952).

of a product and to the "quality" concept its intrinsic or physical characteristics. This approach cuts both ways. If it is appropriate in considering the grade and quality of products for purposes of Section 2(b), it is equally applicable to that determination under Section 2(a). We cannot approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case. The ambiguities of the Robinson-Patman Act are troublesome enough without further muddying the water through inconsistent administrative determinations dealing with important questions of law. Ultimately it is the Court which has the duty to decide such questions. As Justice Brandeis wrote, concurring in *St. Joseph Stock Yards v. United States*, 298 U.S. 38, 84 (1936), "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceedings in which facts were adjudicated was conducted regularly." See also *United States v. Morgan*, 307 U.S. 183, 191 (1939).

Since the Commission's erroneous determination that the products were of like grade and quality was an essential element of its cease and desist order, the petition to set aside the order is granted. We do not render any decision on the other questions presented in the case. The Petitioner's arguments concerning injury to competition and its cost justification defense seem to have considerable merit, but we do not pass on them here. The holding that the products were not of like grade and quality requires us to set aside the Commission's order and make it unnecessary for us to consider the other points raised.

Petition to set aside the cease and desist order is

GRANTED.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1964

No. 20463

THE BORDEN COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

*On Petition for Review of an Order of the Federal
Trade Commission*

Before HUTCHESON, RIVES and BROWN, Circuit
Judges.

JUDGMENT

This cause came to be heard on the petition of The Borden Company, for review of an Order of the Federal Trade Commission issued on January 30, 1963, in Docket No. 7129, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition to set aside the cease and desist order in this cause be and the same is hereby, granted.

December 4, 1964.

Issued as Mandate: December 30, 1964.

(31)

OPPOSITION

BRIEF

INDEX

	PAGE
Question Presented -----	1
Questions Not Presented -----	2
Statement -----	3
Reasons for Denying the Writ -----	9
Conclusion -----	17

CITATIONS

Cases:

<i>Anheuser-Busch, Inc.</i> , 54 F.T.C. 277 (1957) --	13
<i>Atalanta Trading Corp. v. FTC</i> , 258 F.2d 365 (2d Cir.1958) -----	14, 15
<i>Automatic Canteen Co. v. FTC</i> , 346 U.S. 61 (1953) -----	14, 15
<i>Borden's Farm Products Co. v. Ten Eyck</i> , 11 F.Supp. 599 (S.D.N.Y. 1935), <i>aff'd</i> , 297 U.S. 251 (1936) -----	10
<i>Callaway Mills Co.</i> , CCH Trade Reg. Rep. Transfer Binder 1963-1965 ¶16800 (FTC, Feb. 10, 1964) -----	3-4, 10, 12-13
<i>Goodyear Tire & Rubber Co.</i> , 22 F.T.C. 232 (1936), <i>rev'd</i> , 101 F.2d 620 (6th Cir.), <i>cert.</i> <i>denied</i> , 308 U.S. 557 (1939) -----	14
<i>Hartley & Parker, Inc. v. Florida Beverage Corp.</i> , 307 F.2d 916 (5th Cir. 1962) -----	14
<i>Standard Oil Co.</i> , 49 F.T.C. 923 (1953) -----	13

Statutes:

Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13

Sec. 2(a), 15 U.S.C. § 13(a) ----- 2, 3, 13

Sec. 2(b), 15 U.S.C. § 13(b) ----- 3, 13

Miscellaneous:

Consumer Brand Preferences and "Like Grade and Quality" Under Robinson-Patman Act, 65 Col. L. Rev. 720 (1965) ----- 13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 1127

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

THE BORDEN COMPANY, *Respondent*.

**BRIEF FOR THE RESPONDENT IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI**

This brief is respectfully submitted on behalf of the Respondent The Borden Company, in opposition to the petition of the Federal Trade Commission for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on December 4, 1964.

Question Presented

The Respondent manufactured and sold two evaporated milk products: (1) a premium product which consistently commanded a higher price at all levels of distribution, and (2) a chemically identical but com-

mercially less acceptable product which the Respondent (like all other producers and handlers thereof) had to sell at lower prices if the product was to be sold at all.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act prohibits price discrimination only in respect of "commodities of like grade and quality."

The question presented is whether on the record before it the Court of Appeals correctly held that the premium product was not of like grade and quality with the commercially different, non-premium product, and that therefore the Respondent's selling of the non-premium product for lower prices than those received for the premium product did not violate Section 2(a) of the Robinson-Patman Act.

Questions Not Presented

The case does not, as stated at page 2 of the petition, present any question whether a mere change in labels can change the grade and quality of a product. The Court of Appeals emphatically rejected any notion that any such "artificial distinction" could be of any legal significance (Pet. App. A, pp. 27-28)*; and the court put its decision squarely on the ground that in this case it has been thoroughly demonstrated that the difference was a very real one, in that the premium product in fact commanded a consistently higher price at all levels of distribution—wholesaler, retailer and consumer—than did the non-premium product.

* "Pet. App. A" means the petition's Appendix A, which is a copy of the Court of Appeals' opinion.

Nor does this case, as urged at pages 8-9 and 16 of the petition, present any question of favoritism to "large buyers" or "chain stores". Quite the contrary, what the record shows (see pages 6-7 below) is that independents as well as chains purchased the non-premium product; that chains as well as independents purchased the premium product; that many independents as well as many chains handled both products; and that the Respondent "made no distinction between large and small accounts." (R. 33).

In fact, this is merely another in a long line of Robinson-Patman cases in which it has uniformly been held that a premium product not only may, but must, be sold at the higher price normally commanded by it in the marketplace; and that the premium differential, established by and customarily existing in the market, is to be taken into account regardless of whether the premium and the non-premium products are physically the same. The Court of Appeals, here, applied precisely the same test for purposes of Section 2(a) of the Robinson-Patman Act as had previously been applied, by the Commission and by the courts, for purposes of Section 2(b) of the same statute.

Statement

Premium and non-premium products, under the Robinson-Patman Act. In the terminology customarily employed by the Commission under the Robinson-Patman Act, a sharp distinction is drawn between "premium" products on the one hand and "non-premium" products on the other. As most recently defined by the Commission, in *Callaway Mills*

Co., CCH Trade Reg. Rep. Transfer Binder 1963-1965 ¶16800 (FTC, Feb. 10, 1964, at p. 21,755), a premium product is one which "normally commands a price higher than that usually received by sellers of competitive goods." The premium product may command the higher price because of "intense public demand" and "saleability". Or it may command the higher price because of "intrinsic superior quality". In either event, whether the reason is its grade or its quality, the fact that the product normally commands a higher price makes it a premium product.

Premium and non-premium products, in the evaporated milk business. This sharp distinction between premium and non-premium products has prevailed for many years in the evaporated milk business. There have been three premium products: Carnation, Pet and the Respondent's Borden brand, which has been on the market for over 70 years. At all levels of distribution, these brands have sold at substantially higher prices than the non-premium brands, consisting in the main of evaporated milk put up by more than 25 different packers under the private labels of the purchasers (Pet. App. A, pp. 23-24, 27; R. 78, 879-84).

Throughout the market, the wholesalers and the retailers have paid more for the premium brands; and likewise they have resold the premium brands for more (and with less selling effort), than the private brands (Pet. App. A, pp. 23-24, 27; R. 431-34, 478-81).

As one of the Commission's wholesaler witnesses put it:

"Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail

trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have \$1.50 or \$2 a case spread to make it interesting." (Pet. App. A, p. 24; R. 330-332)

And as the Hearing Examiner pointed out in that connection, "Respondent was not offering its private-label milk for that much less than its Borden brand milk." (R. 54).

Reasons why Borden brand evaporated milk is a premium product. The reasons why the Respondent's Borden brand milk commanded that higher price are abundantly clear in the record. Consumers had confidence in the Borden brand name and in the Company behind it—a confidence grounded in factors such as long and favorable experience with the Borden product, unfavorable experiences with private labels, physicians' recommendations as to the best brand for infant feeding, and the Respondent's advertising and promotional efforts (Pet. App. A, p. 23; R. 24-25, 230, 246-47).

Consumers' favorable experience with the Borden brand product, in contrast to unfavorable experiences with private labels, was no accident. It was the result of the Respondent's continuing concern for the Borden brand product, from the day it was packed to the day it was put in the hands of the consumer, all to the end that no consumer should ever get any stale or otherwise deteriorated Borden brand milk. First packed, first shipped was the rule, even though that often involved costly shipping from far-away plants or storage warehouses;

and the Respondent had more than 200 representatives out in the field, going into the retail stores and checking the freshness of the shelf and storeroom stocks of the Borden brand product (R. 60-61, 493-94, 510-11, 544).

With respect to the private label, on the other hand, the Respondent simply packed the product as and when instructed by the customer and held it at the packing plant subject to the customer's delivery instructions; and the Respondent did nothing more, and it took no responsibility whatsoever, after the product left the factory door. The private label product was sold f.o.b. plant, with only the purchaser's label on it; the Respondent's name nowhere appeared on it; and any use of the Respondent's name in connection with that product was prohibited (R. 61-62, 519-22).

Independents as well as chains handled both the non-premium product and the premium product. The Respondent, manufacturing and selling both the premium (Borden) brand and the non-premium (private label) product "made no distinction between large and small accounts" and no purchaser was "for any reason, denied the right to buy private-label evaporated milk from the Respondent." (R. 33, 54).

The handlers of the private label included not only some chain retailers (R. 813-15) but also an even larger number of wholesale grocery concerns (R. 809-12) and cooperative buying associations of retailers (R. 815). And everyone who purchased at the same plant in any given month paid the same price, regardless of who he was, how big he was, or how much he bought (R. 79).

So, too, with the handlers of the Borden brand, which was sold on a uniform delivered price basis

throughout the country (R. 19) to all kinds of customers including retail chains (R. 820-22) as well as wholesalers (R. 815-18) and cooperative buying associations of retailers (R. 819-20).

Many purchasers, including chains as well as independents, bought both the Borden brand product and the private label product. With the private label freely available to them at the lower prices, the group of purchasers of private label from the Respondent nevertheless kept right on buying the Borden brand, at the higher prices, in substantially undiminished quantities (Pet. App. A, p. 24; R. 943). They did not substitute the lower priced private label product for the higher priced premium product. They regarded private label and Borden brand as two different products, each with its own price level and its own competitive situation.

The absence of competitive injury. As previously noted, the wholesalers and retailers had to pay more for Borden brand, but they could resell it for more. They bought private label for less, but they also had to resell it for less.

Turning to the producer or "primary" line of competition, the evidence showed some shifting of private label business to the Respondent at plants where it had the geographic and freight advantage, and some shifting of such business away from the Respondent in instances where competitors' plants were more advantageously located. The over-all result was that during the complaint period the testifying competitors, far from losing out, actually increased their market share,

sold larger amounts of private label than before, and sold it at higher prices (R. 31-57, 753-67).

The Hearing Examiner made a detailed analysis of the evidence, after a trial extending over almost three years, and ordered the complaint dismissed on the ground that there was no competitive injury (R. 57).

The absence of any basis for the contrary findings at the Commission level—findings made by only two of the five Commissioners, with one Commissioner dissenting and two not participating—was thoroughly briefed before the Court of Appeals, which found it unnecessary to decide the issue in view of its decision on the threshold issue of like grade and quality. The Court nevertheless observed, at the close of its opinion, that the Respondent's arguments as to the absence of competitive injury "seem to have considerable merit" (Pet. App. A, p. 30).

The cost-justification of the challenged price differences. The Hearing Examiner also ordered the complaint dismissed on the separate and independent ground that the Respondent (whose costs had been analyzed in meticulous detail by independent public accountants) had sustained its burden of proving that the challenged price differences were cost-justified (R. 74).

Here again, the absence of any warrant for the contrary conclusion at the Commission level was briefed in detail before the Court of Appeals. Again, as on the injury issue, a decision by the Court of Appeals proved unnecessary; but as to the cost justification issue, too,

the court commented that the Respondent's arguments "seem to have considerable merit" (Pet. App. A, p. 30).

Reasons for Denying the Writ

1. **The Court of Appeals' decision was clearly correct.** The opinion of the Court of Appeals, holding that the Respondent's premium product and its non-premium product were not of like grade and quality, evidences a most thoughtful attention to the considerations urged upon the court by the Commission as well as by the Respondent; and the court's detailed exposition of the reasons for its holding need not be repeated here.

What it comes down to, quite simply, is that the court recognized that trade and commerce, not chemistry, is the province of the Robinson-Patman Act, and that the prices at which people actually buy and sell goods are at the very heart of trade and commerce. Once those facts are recognized, it inexorably follows that a product which customarily commands a price of well over \$6.00 per case is a quite different product from one which everybody has to sell for around \$5.00 or less in order to sell it at all (Pet. App. A, pp. 23-24, R. 19-20, 26-30, 78). And as the Commission concedes, at page 9 of the petition, "Congress explicitly did not prohibit a seller from charging less for a different product."

The Commission, contending that commercially different products are nevertheless the same for purposes of this trade regulation statute, simply asserts that the "grade and quality" of commodities refers to their

physical properties and not to the prices that they command in the marketplace—and says that this is “a matter of simple English usage.”

That was not the “simple English” of it to Judge Learned Hand. In a decision under another trade regulation statute, handed down at the very time when the Robinson-Patman amendment was pending before the Congress, Judge Hand emphasized the significance of consumer preferences grounded in considerations other than physical differences, as follows:

“Commercially the [advertised] brands had come to mean a better grade of milk, for the hygienic properties of a product do not fix its commercial quality, but the opinion in which buyers hold it.” *Borden’s Farm Products Co. v. Ten Eyck*, 11 F. Supp. 599, 600 (S.D.N.Y. 1935), *aff’d*, 297 U.S. 251 (1936)

Moreover, as recently as 1964, the Commission’s own view as to the “simple English” reading of “grade and quality” was radically different from its presently asserted position. In *Callaway Mills* (pages 3-4 above) the Commission categorically held that in order to establish “grade and quality” proof must be adduced not only as to “intrinsic quality” but also as to “saleability”—thus assigning to the term “grade” the public demand or saleability characteristics of a product, and to the term “quality” the intrinsic or physical characteristics of a product.

In short, the “simple English” of it is that the statute, in so many words, calls for likeness in two respects: “grade and quality”—likeness in the marketplace as well as likeness in physical composition. Since

the proof established beyond a shadow of a doubt that Borden brand and private label were radically unlike in the marketplace, the first of the two statutory criteria was not met and the two products were not of like grade and quality within the meaning of the statute.

Equally without merit are the Commission's references to legislative history. The Patman remarks quoted at pages 9-10 of the petition were obviously of an off-hand nature ("I have not time to discuss that feature"); they referred only to "same quality"; and they made no reference to "grade". The more formal and definitive statement on the subject, made by the man whose authorship of the Patman bill was expressly confirmed by Congressman Patman, is the one set out at pages 10-11 of the petition. That statement expressly sanctioned the very kind of premium brand-private label operation which is involved in this present case. The Respondent sold its standard Borden brand evaporated milk at the prices commanded by that product, just as the legislators in the quoted statement contemplated a manufacturer would continue to do. The Respondent also packed evaporated milk under the private labels of the purchasers, just as the legislators there said it would be free to do. And the equality of treatment among private label purchasers, which the legislators wished to assure, was established in exactly the way the legislators said it should be; viz., the Respondent stood ready to pack that product for all, on the same terms (Pet. App. A, p. 21; R. 33, 54).

Likewise without basis is the Commission's claim that the Court of Appeals' decision is a departure from the Commission's "well-settled administrative inter-

pretation." The simple fact, as the Court of Appeals pointed out, is that in none of the Commission's previous cases had there been "any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not." (Pet. App. A, p. 27). In the earlier cases, a premium product was a mere theoretical possibility, involving (as the Commission puts it at page 12 of the petition) goods which "might" be sold at different prices. Here, in total contrast, the premium character of the Borden brand and the non-premium character of the private label is no mere theoretical possibility; it is a thoroughly proved actuality.

2. The Court of Appeals used precisely the same product comparison test as has uniformly been used by the Commission and by the courts under the Robinson-Patman Act. There is nothing at all new about taking into account, for product comparison purposes under the Robinson-Patman Act, the prices at which the products customarily sell in the marketplace as well as the physical characteristics thereof. Both the Commission and the courts have been doing that, time and again, for many years. The court below cited a number of examples, including the Commission's own most recent *Callaway Mills* decision, handed down in 1964 (Pet. App. A, p. 29).

In that case the Commission categorically held that in order to prove "grade and quality" attention must be given not only to the "intrinsic superior quality" of one product over another, but also to the "intense public demand" that may exist for one product as com-

pared with another (CCH Trade Reg. Rep. Transfer Binder 1963-1965, at p. 21,755).

And as the Commission had stated some years earlier in *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 302 (1957):

"The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market."

Similarly in *Standard Oil Co.*, 49 F.T.C. 923, 952 (1953) the Commission stated that:

"... in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor."

The foregoing rulings were made for purposes of Section 2(b) of the Robinson-Patman Act. In the present case the issue arises under Section 2(a) of that same trade regulation statute. The Court of Appeals in the present case applied precisely the same product comparison test as had been applied in all of the earlier Robinson-Patman cases.

This, on the face of it, would hardly seem to give rise to any problem calling for consideration by this Court.*

* The Commission, in the absence of any legal authority for its position, quotes (p. 16) an advertising magazine's characterization of the decision below. For a professional discussion of the matter see Consumer Brand Preferences and "Like Grade and Quality" under Robinson-Patman Act, 65 Col. L. Rev. 720 (1965), which concludes at page 725 with the statement that "... once such a consumer preference has been demonstrated, the Commission and the courts should acknowledge that physical comparison is not the only basis for selection in the market place, and conclude that the similar products sold under premium and private labels are not of like grade and quality."

3. The Court of Appeals' decision is in full accord with the decisions of this Court and of all the Courts of Appeal; there is no conflict. The Commission asserts no conflict, and there is none.

Indeed, the principal judicial authority relied upon by the Commission, before the Fifth Circuit, was a decision of that same Court of Appeals; and the inapplicability of the earlier case, *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F. 2d 916 (5th Cir. 1962) was specifically pointed out in the court's opinion in the present case (Pet. App. A, p. 26).* In *Hartley & Parker*, in total contrast to the present case, the two products were not only physically alike but were being marketed and represented as the same product. Thus the two *Hartley & Parker* products were in fact like goods, commercially as well as physically. The *Hartley & Parker* situation was the same as in the old *Goodyear* case, where the private label handler, Sears, was in fact trading on the Goodyear brand name and thus rendering the two products alike, commercially as well as physically.**

The Fifth Circuit's decision in the present case, far from being in conflict with any other court, is affirmatively in accord with the highly relevant decisions of the Second Circuit in *Atalanta Trading Corp. v. FTC*, 258 F. 2d 365 (2d Cir. 1958), and of this Court in *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

* Judge Rives, who wrote the opinion in *Hartley & Parker*, was also a member of the panel which heard the present case, and he joined in the unanimous decision below.

** *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, 295, 297 (1936); Brief of Counsel Supporting the Complaint in Opposition to Respondent's Motion to Dismiss, pp. 2-6; Order dated June 26, 1934.

In *Atalanta* (as the Fifth Circuit noted in the present case, Pet. App. A, p. 28, n. 8) one of the reasons for the Second Circuit's rejection of the Commission's ruling on like grade and quality was that the Commission had erroneously failed to take into account the prices at which the products were sold—precisely the error that the Commission made in the present case.

In *Automatic Canteen*, this Court emphasized at pages 63 and 74 that the Robinson-Patman Act should be interpreted and applied consistently with "the broader antitrust policies that have been laid down by Congress" and so as to avoid a "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." The court below, after quoting those statements, went on to note that "Were we to ignore the fact that a brand name product may be able to command a higher price than an unknown brand because of its public acceptance, then we would be encouraging just such a price uniformity and rigidity, in conflict with the realities of the marketplace and Congressional antitrust policies." (Pet. App. A, p. 25).

The Commission stands silent with respect to *Atalanta* and *Automatic Canteen*, and fails even to mention either of those highly significant cases.

4. The petition seeks to raise hypothetical questions, not presented by or ripe for decision on this record. The Commission, unable to raise any substantial question about the soundness of what was actually decided by the court below, has in the main directed its petition to the purely hypothetical questions noted at pages 2-3 above.

The time, if ever, when a lower court holds that a mere change in labels can change the grade and quality of a product will be the appropriate occasion, we respectfully submit, for this Court to address itself to that proposition. In the present case, as noted at page 2 above, the proposition has already been categorically rejected by the Court of Appeals.

So, too, with the alleged problems of favoritism to large buyers and chain stores. As shown at pages 6-7 above, no such problems are presented on this record. Purchasers of all classes, small and large, independent and chain, bought both products, and all were treated alike. The time, if ever, when another *Goodyear* situation arises, with a single large purchaser of private label buying at a lower price but in fact trading on and getting the benefit of the brand name, will be the appropriate occasion for this Court to consider alleged "large purchaser" and "chain store" problems. On the present record, consideration of such matters would be entirely hypothetical.

Conclusion

The decision below is clearly correct; it is in full accord with previous decisions of the Commission, of the lower courts and of this Court; and the issues sought to be presented by the petition are hypothetical.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement.....	3
Introduction and summary.....	8
Argument:	
Two products which are otherwise identical are of "like grade and quality" whether sold under a private brand label or at a higher price under the manufacturer's own brand.....	11
A. Congress intended the "grade and quality" of commodities to refer to their physical characteristics, not to consumer preferences attribut- able to brand labels.....	11
1. The language of the statute.....	11
2. The legislative history.....	13
B. The courts of appeals' interpretation of Section 2(a) would remove from the prohibitions of that Section one of the major evils at which it was directed.....	16
C. The decision below is contrary to the Commission's well-settled inter- pretation.....	22

II

Argument—Continued

Two products, etc.—Continued

	Page
D. The Commission's treatment of "grade and quality" under Section 2(a) is not inconsistent with its treatment of that issue in evaluating the "meeting competition" defense under Section 2(b)-----	25
Conclusion-----	28

CITATIONS

Cases:

<i>Anheuser-Busch, Inc.</i> , 54 F.T.C. 277-----	26
<i>Atalanta Trading Corporation v. Federal Trade Commission</i> , 258 F. 2d 365-----	12
<i>Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co., Inc., et al.</i> , CCH Trade Reg. Rep. Transfer Binder, 1963-1965, ¶ 16,800-----	26, 27
<i>Federal Trade Commission v. Anheuser-Busch, Inc.</i> , 363 U.S. 536-----	10, 20
<i>Federal Trade Commission v. Cement Institute</i> , 333 U.S. 683-----	12
<i>Federal Trade Commission v. Henry Broch & Co.</i> , 363 U.S. 166-----	16
<i>Federal Trade Commission v. Mandel Brothers, Inc.</i> , 359 U.S. 385-----	23
<i>Federal Trade Commission v. Morton Salt Co.</i> , 334 U.S. 37-----	17, 19
<i>Goodyear Tire & Rubber Co., The</i> , 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620-----	15, 23, 24
<i>Hansen Inoculator Co., Inc.</i> , 26 F.T.C. 303-----	23
<i>Hartley & Parker, Inc. v. Florida Beverage Corp.</i> , 307 F. 2d 916-----	24

III

Cases—Continued

	Page
<i>International Salt Co.</i> , 49 F.T.C. 138.....	23
<i>Moore v. Mead's Fine Bread Co.</i> , 348 U.S. 115..	19
<i>Page Dairy Co.</i> , 50 F.T.C. 395.....	23
<i>Standard Oil Co. v. Federal Trade Commission</i> , 340 U.S. 231.....	26
<i>United States Rubber Co.</i> , 28 F.T.C. 1489.....	23, 24
<i>United States Rubber Co.</i> , 46 F.T.C. 998.....	25
<i>United States v. American Trucking Ass'ns.</i> , 310 U.S. 534.....	23
<i>Whitaker Cable Corp.</i> , 51 F.T.C. 958, affirmed, 239 F. 2d 253.....	23

Statutes:

Clayton Act, Section 2, 38 Stat. 730.....	15
Clayton Act, Section 2, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13: Section 2(a).....	2, 3, 5, 9, 10, 11, 12, 13, 15, 19, 20, 24, 25
Section 2(b).....	25
Federal Trade Commission Act, Section 5.....	17

Congressional material:

80 Cong. Rec. 8115.....	13
Hearings on H.R. 4995 Before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421, 469.....	14
Hearings on H.R. 4995 Before the House Committee on the Judiciary, 74th Cong., 1st Sess., p. 9.....	14
H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4..	15

Miscellaneous:

<i>Attorney General's National Committee to Study the Antitrust Laws</i> , Report 158.....	23
Austin, <i>Price Discrimination and Related Prob- lems under the Robinson-Patman Act</i> , 39 (2d ed., 1959).....	23

Miscellaneous—Continued

	Page
<i>Battle of the Brands</i> , Price-Conscious Buyers Help Private Labels Expand Market Share, Wall Street Journal, May 24, 1965, p. 1-----	18
" <i>Battle of the Brands, The</i> ," Dun's Review and Modern Industry, May 1964, p. 53-----	17
Cassady & Grether, <i>Proper Interpretation of</i> "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act, <i>The</i> , 30 So. Calif. L. Rev. 241 (1957)-----	23
Edwards, <i>Price Discrimination Law, The</i> (1959):	
P. 31-----	16
Pp. 463-464-----	23
<i>Food Topics</i> , October 1959, pp. 6-7-----	17
<i>How To Save \$200 a Year at a Supermarket</i> , Consumer Reports, February 1961, pp. 64-67-----	18
Patman, <i>Robinson-Patman Act, The</i> , 27 (1938)-	23
Rowe, <i>Price Discrimination under the Robin-</i> <i>son-Patman Act</i> , 76 (1962)-----	23
Seidman, <i>Price Discrimination Cases</i> , reprinted in 2 Hoffman's <i>Antitrust Laws and Tech-</i> <i>niques</i> , 409, 424-428 (1963)-----	23

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE BORDEN COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT*

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 975-985) is reported at 339 F. 2d 133. The opinion of the Federal Trade Commission (R. 98-128) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964 (R. 986). On March 4, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 3, 1965 (R. 987). The petition was filed on the latter date and was granted on October 11, 1965 (R. 988). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(a) of the Clayton Act, as amended, prohibits certain discriminations in price involving "commodities of like grade and quality." The question presented is whether products identical in all other respects cease to be of "like grade and quality" when they are sold at a higher price under the manufacturer's nationally advertised brand than under retailers' private brands.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

STATEMENT

The Federal Trade Commission issued a complaint in 1958 charging that since January 1, 1956, the Borden Company ("Borden") had discriminated in price in selling evaporated milk, in violation of Section 2(a) of the Clayton Act, as amended. The Commission alleged that respondent sold the identical evaporated milk under private labels at lower prices than it sold its "Borden" brand milk, and that the effect of such price discrimination may be substantially to lessen competition with Borden's own competitors ("primary line injury"), and with competitors of Borden's favored purchasers ("secondary line injury") (R. 1-5).

Borden is one of three companies which sell evaporated milk under a nationally advertised brand name (R. 99).¹ Evaporated milk also is produced and distributed under private brands by chain stores and by small processors for sale under the brands of their customers (R. 99-100). All of these producers competed with Borden in the sale of evaporated milk (R. 100).

Respondent sells its Borden brand at the same delivered price throughout the United States; it sells this brand primarily to wholesalers or jobbers, and to chain stores (R. 78). In addition, since 1938 it has distributed evaporated milk under the private brands of its purchasers. It sold such milk at prices which were net f.o.b. at its processing plant, and such prices

¹ The two others are the Pet Milk Company and the Carnation Company (R. 99).

varied from plant to plant and from month to month (R. 79). During the period covered by the complaint, "the f.o.b. price of respondent's private label evaporated milk at its various plants was consistently and substantially lower than the delivered price of respondent's Borden brand evaporated milk" (R. 80). The "physical composition" and "quality" of the private brand evaporated milk were the same as those of the Borden brand (R. 79-80).

There is no evidence in the record that Borden refused to sell private brand evaporated milk to any purchaser who specifically requested it.² But Borden never offered the private brand milk to its customers generally. Indeed, its merchandising manager in May, 1957, explained that Borden's policy was that "Our Brokers *should not* bring up the subject [of private label evaporated milk] themselves. * * * We do *not* wish Brokers to solicit such business" (emphasis in original; R. 743). A few months later, he stated that "We certainly don't want to end up by soliciting a bunch of 'peanut' accounts." (R. 827).

Wholesalers and retailers testified that they would have purchased the Borden private brand evaporated milk, but that it was not made available to them. (R. 207, 222, 223, 279, 280, 297, 304, 320, 321, 329, 340, 341, 352-353, 364, 372, 373, 387. See, also, R. 241). Two of the wholesalers were told by their brokers that the latter knew nothing about the availability of the private brand (R. 321, 329, 392).

² Although the examiner found that there was "no evidence that any purchaser was, for any reason, denied the right to buy private-label evaporated milk from the Respondent" (R. 54), the Commission vacated his decision (R. 128).

Many of these wholesalers and retailers viewed the private brand as an aid in competing with the large chains (R. 207, 241-242, 280, 304, 321, 322, 365). Thus, an official of a wholesale grocery company which was owned by retailers explained that "it would have enabled us, possibly, to have had a label or a milk that we could have met chain store competition with on their private labels" (R. 280).

After full administrative proceedings, the Commission held that the respondent had violated Section 2(a) as charged, and entered a cease-and-desist order (R. 98-128).³ Following its prior decisions that "goods which are the same in all respects except label are * * * goods of like grade and quality" (R. 101-102), the Commission ruled that since, as respondent conceded, the Borden brand and the private brands of evaporated milk were "physically * * * alike" (R. 100-101),⁴ they were "commodities of like grade and quality" within the meaning of Section 2(a). The Commission further found that the price differentials

³ Commissioner Elman dissented without opinion, and Commissioners Anderson and Higginbotham did not participate (R. 128).

⁴ The Commission found (R. 79-80) that "there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices."

constituted "discrimination" (R. 105-106), that the discriminations threatened competitive injury in both the primary and secondary lines (R. 106-120), and that they were not cost justified (R. 126).⁵

In finding injury to competition in the primary line (competitors of Borden), the Commission pointed out that the evaporated milk industry has suffered a decline in sales (R. 107); that since 1950 at least ten concerns, mostly in the Midwest market area involved in the case, have discontinued production of evaporated milk and that no new concerns are coming into the business (R. 115, 107-108); that because of the competitive situation of respondent and its competitors in the Midwest market area, "little is needed to shift the competitive balance" (R. 115); that, in contrast to its competitors, the respondent is "a large and powerful concern" (R. 114); and that respondent entered the market using "a discriminatory pricing structure" which "put a severe strain on the smaller competitors," at least one of which went out of business as a result and all of which permanently lost "large and important" accounts to respondent (R. 115, 111). The Commission concluded (R. 115) that "[i]n this market setting, respondent's price discrimination is a clear threat to the entire competition provided by

⁵ The examiner had held that the Borden brand and the private brands were of like grade and quality and that the price differentials constituted discriminations (R. 21-22, 31). He further held, however, that the discriminations did not result in competitive injury at either level of competition (R. 50, 57) and that in any event the discriminations were cost justified (R. 74). He therefore recommended that the complaint be dismissed (R. 74). The Commission vacated the examiner's decision and issued its own findings and conclusions (R. 128, 76-97).

the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely."

The Commission's finding that respondent's price discriminations also injured competition in the secondary line (competitors of the Borden customers who received the lower prices) rested on the testimony that retailers and wholesalers who purchased the Borden brand would have bought the substantially lower-priced private label milk if it had been made available to them (*supra*, p. 4); and that, because of "the extremely low or nonexistent profit margins on evaporated milk" (R. 117), the unavailability of this lower-priced product subjected them to a substantial competitive disadvantage (R. 116-120; see R. 741-743).

The court of appeals set aside the Commission's order. It held that although the products sold under the Borden brand and under the private labels had the same "physical properties," the products were not of "like grade and quality" because the "Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution" (R. 978). The court stated that the issue "is purely one of law, turning on the proper construction of the statutory phrase 'of like grade and quality,' " namely, "whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination" (R. 977, 979). It ruled (R. 981) that "[i]n determining whether products

are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional"; and that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden Company through its brand name." (R. 983). In view of its ruling on the statutory issue the court found it unnecessary to consider any of the other questions in the case (R. 985).

INTRODUCTION AND SUMMARY

The court of appeals noted (R. 978) that the Borden brand and the private brand cans of evaporated milk "are packed exactly the same" except for the difference in labels, and that it was "undisputed" that "the chemical content of the products is identical." The court further conceded (R. 982) that "the mere affixing of different labels to physically identical products is [not] sufficient to make them different in grade * * *." It held (*ibid.*), however, that "when those labels are proven to have demonstrable commercial significance * * * [then] they can change the grade of a product." In other words, under the court of appeals' theory the grade and quality of goods depend upon not only their physical characteristics, but also upon the extent of consumer acceptance of the brand name under which they are sold; and physically identical goods cease to be of the same "grade and quality" if the advertised "label enjoys a significant consumer acceptance such that buyers are

willing to pay more for the product which bears that brand" (R. 982).

The effect of this ruling is to remove from the coverage of Section 2(a) of the Robinson-Patman Act virtually all discriminations in price between physically identical commodities that are sold under both a well-advertised brand name and a private label. For it is common knowledge that private brands today are used principally by large retail distributors as a means for selling widely-used products at prices below those of the well-known, extensively advertised brands. The effect of the court of appeals' interpretation of the "like grade and quality" clause is that, no matter how substantial the price differential between the manufacturer's brand and the private brand may be, and no matter how serious a competitive injury the discrimination may cause, the Commission is denied any authority to deal with such anticompetitive practices under Section 2(a). On the other hand, the Commission's settled view that the "grade and quality" of a commodity depend solely upon its physical characteristics and not upon the extent to which the public has been persuaded to pay more for a particular brand, permits the Commission fully to examine and evaluate the effect of the discrimination upon competition under the statutory criteria governing that issue. Thus, the court of appeals' conclusion (R. 983) that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden company through its brand

name" does not justify its interpretation of "like grade and quality." The "value in the evaporated milk market" of the Borden brand name can be given whatever weight it is entitled to in determining the competitive effect of Borden's price discriminations—an issue upon which the court of appeals has not yet passed and which therefore is not now before this Court. *Cf. Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542.

An interpretation of Section 2(a) that has such unfortunate consequences should not be made unless clearly compelled by the language itself, the legislative history, or the overall statutory design. We shall show, however, that all three of these factors compel the contrary conclusion, *i.e.*, they show that Congress intended the "grade and quality" of a commodity to relate only to its physical characteristics and not to consumer preferences based upon brand names that are reflected in the higher prices that particular brands can command in the marketplace. More particularly, we shall show that Congress specifically considered and rejected the suggestion that differences in the brand names under which the same commodity is sold would make them of different "grade and quality"; that treating such differences in consumer preferences as differences in "grade and quality" would prevent the Commission from dealing under Section 2(a) with one of the major evils at which that section was directed; and that the court of appeals' construction of the statute is contrary to the Commission's settled interpretation.

ARGUMENT

TWO PRODUCTS WHICH ARE OTHERWISE IDENTICAL ARE OF "LIKE GRADE AND QUALITY" WHETHER SOLD UNDER A PRIVATE BRAND LABEL OR AT A HIGHER PRICE UNDER THE MANUFACTURER'S OWN BRAND

A. CONGRESS INTENDED THE "GRADE AND QUALITY" OF COMMODITIES TO REFER TO THEIR PHYSICAL CHARACTERISTICS, NOT TO CONSUMER PREFERENCES ATTRIBUTABLE TO BRAND LABELS

1. *The language of the statute.* Section 2(a) prohibits certain discriminations in price between purchasers of commodities of like grade and quality. In common parlance, two commodities are of "like grade and quality" when they are the same. "Grade and quality" involve a commodity's inherent characteristics, not the price at which it is sold. The fact that a particular brand name is so well accepted by consumers that some are willing to pay more for the identical product when sold under that name than when sold under a less well known label does not change the "grade and quality" of the product. "[G]rade and quality" remain the same no matter what brand name the commodity is sold under or how much more some consumers are willing to pay for it. The change is in consumer "acceptance" of, or "preference" for, the particular brand, which change is reflected in consumer willingness to pay a higher price therefor.

In the present case the raw milk, the canning processes, the cans and the final product (the evaporated milk) are concededly identical; the only difference is the label which respondent affixes to the cans. Because respondent has extensively advertised its Borden brand, many consumers are willing to pay more

for an identical can of evaporated milk that bears the Borden label than they are willing to pay for the same can when it has a private label. But if such consumers knew that they were buying the identical product under the Borden label, they would hardly conclude that they were obtaining a product of superior "grade and quality" merely because the extensive advertising of that brand enables respondent to sell it at a higher price.

"[D]iscrimination in price," as used in Section 2(a), means "selling the *same kind of goods* cheaper to one purchaser than to another" (*Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 721) (emphasis added). The limitation of the statutory prohibition to discriminations involving commodities of "like grade and quality" serves important functions. On the one hand, it makes it clear that a seller may charge different prices for products having significant variations in grade and quality—such discriminations in price did not pose the kind of competitive injury with which Congress was concerned in the Robinson-Patman Act. On the other hand, the limitation prevents "emasculation of the section by a supplier's making artificial distinctions in his product"⁶ which do not really change its grade and quality. It also reflects the fact that any attempt to measure the economic significance of price discriminations between different grades and qualities of the same product would entail an almost impossible in-

⁶ *Atalanta Trading Corporation v. Federal Trade Commission*, 258 F. 2d 365, 371 (C.A. 2).

quiry. If, for example, the Borden brand of evaporated milk had a 75 percent higher fat content than the private brand and contained additional vitamins, it would be almost impossible to determine whether the higher price of the Borden brand merely reflected those facts. By restricting Section 2(a) to discriminations involving commodities of like grade and quality, Congress wisely provided a simple test for determining the threshold applicability of the Act.

2. *The legislative history.* The legislative history confirms that Congress used the words "like grade and quality" in their normal sense of referring to the physical characteristics of goods, and not to their selling price. The history shows that Congress was aware that chain stores had used private brands to gain an unfair competitive advantage over their smaller competitors; and that it intended to prohibit sellers from discriminating in the prices at which they sold the same product, whether they sold it under a name brand or under a private brand.

Thus, during the debate in the House, Representative Patman, one of the sponsors of the legislation, explained that differences in brand were irrelevant in determining whether goods were of "like grade and quality" (80 Cong. Rec. 8115, emphasis added):

Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for particular chain stores. Is there anything in this bill calculated to remedy that situation?

Mr. PATMAN. * * * I have not time to discuss that feature, but the bill will protect the

independents in that way, because *they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package*, and this will remedy the situation to which the gentleman refers.

MR. TAYLOR of South Carolina. *Irrespective of the brand.*

MR. PATMAN. *Yes; so long as it is the same quality.* * * *

Indeed, the House Committee rejected a proposed amendment that would have limited the Act to price discriminations with respect to commodities of "like grade and quality and brands." Hearings on H.R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421. Mr. Teegarden, Counsel to the United States Wholesale Grocers' Association and generally regarded as the author of the Act (Hearings, *supra*, 1st Sess., p. 9), strongly objected to the proposal. In a letter to the Committee, he stated (*id.*, 2d Sess., at 469):

To amend the bill by inserting "and brands," after the words "commodities of like grade and quality," as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent

could use an A & P private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed.

The House Committee report quoted from the Commission's decision in *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6), where the Commission had held that Goodyear violated Section 2(a) by selling to Sears, Roebuck & Co. under the latter's private brand the same tires which it sold at higher prices under its own brand name. H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4. The *Goodyear* case also was referred to frequently during the hearings (House Hearings, *supra*, pp. 337, 355, 472, 473). Although that case was decided under Section 2 as it read prior to the Robinson-Patman Act, the earlier statute had a similar provision relating to "grade" and "quality."

¹In the original Clayton Act, Section 2 broadly prohibited discriminations in price that threatened competitive injury. A proviso permitted price discriminations "on account of differ-

Thus, the Committee was aware of the Commission's view that differences in brand did not change the grade or quality of a commodity; and, in the light of the other legislative history already discussed, the Congressional intention to make "grade and quality" turn solely upon physical characteristics is plain.

In short, as Professor Corwin Edwards, one of the leading commentators on the Act, has stated, "it is evident that the wording was carefully chosen to prevent price concessions to large distributors who sold commodities under their own private brands." Edwards, *The Price Discrimination Law*, 31 (1959).

B. THE COURTS OF APPEALS' INTERPRETATION OF SECTION 2(a)
WOULD REMOVE FROM THE PROHIBITIONS OF THAT SECTION ONE
OF THE MAJOR EVILS AT WHICH IT WAS DIRECTED

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit *all devices* by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission v. Henry Brock & Co.*, 363 U.S. 166, 168, emphasis added). The granting to large buyers of discriminatorily lower prices for private brand merchandise can be just such a device.

ences in the grade, quality, or quantity of the commodity sold * * *." 38 Stat. 730.

The fact that the original Clayton Act used the terms "grade and quality" in the disjunctive, and the Robinson-Patman Act uses them in the conjunctive, is of no significance. There is nothing to show that Congress intended thereby any change in the substantive standards. On the contrary, as developed in the text above, the legislative history demonstrates that Congress did not intend a change in brand name to constitute a change in the "grade and quality" of a commodity.

Thus, the effect of the court of appeals' decision is to bar the Commission at the threshold from dealing with one of the major evils at which the statute was directed.⁸

1. Price discriminations can take many forms. They are just as anticompetitive if accomplished by giving a lower price on the same commodity when sold under a private brand than when sold under a name brand, as when done through a price differential on the same brand. In either situation the purchaser who does not have the benefit of the discriminatorily lower price is under an obvious competitive disadvantage as against the purchaser who does. Cf. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46-47.

A retailer who can offer his customers the lower-priced private brand has a significant advantage over his competitors who cannot do so. For there are today a tremendous number of customers who prefer the cheaper private brands over the more expensive well-known ones. It has been estimated that in the past ten years the volume of business accounted for by private brands has doubled (*The Battle of the Brands*, Dun's Review and Modern Industry, May 1964, p. 53); six years ago it was reported that such brands accounted for more than 25 percent of the food sales in supermarkets (*Food Topics*, October 1959, pp.

⁸ We are not suggesting that the Commission could not also deal with this problem under Section 5 of the Federal Trade Commission Act. In the present case, however, the Commission elected to proceed under the narrower provisions of the Clayton Act, which specifically deal with price discrimination.

6-7). See, also, *Battle of the Brands*, Price-Conscious Buyers Help Private Labels Expand Market Share, Wall Street Journal, May 24, 1965, p. 1. Some of these customers are willing to accept what they consider to be an inferior product just because it is cheaper. But a growing number of consumers has come to realize that in many cases the lower-priced private brand merchandise is just as good as the higher-priced name brand goods. See Wall Street Journal article, *supra*. Large organizations of consumers, as well as cooperative groups, devote themselves to the identification of such private brand bargains. See *How To Save \$200 a Year at a Supermarket*, Consumer Reports, February 1961, pp. 64-67.

A retailer who cannot satisfy the large public demand for these lower-priced private brand goods obviously cannot compete effectively with a retailer who can offer them. Where the private label merchandise is in fact made available only to large purchasers, the inevitable result is to injure their smaller competitors. Indeed, the ability of the large retailers to offer the lower-priced private label brands causes competitive injury not only in the market for the particular product but also in the broader sense that the favored retailers can create or enhance a general reputation for selling generally at lower prices than the smaller stores. See R. 93. In this case many wholesale and retail grocers testified that they would have purchased respondent's private brand evaporated milk had it been made available to them, to enable them to compete more effectively with the large retailers who had such private brand. See the Statement, *supra*, pp. 4-5.

Thus, respondent's price discriminations involved the very kind of anticompetitive situation that the statute sought to reach. "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 43.

2. A seller may also use an unadvertised brand in order to engage in price discrimination designed to injure his competitors (primary line injury). Clearly it would be illegal under Section 2(a) for a seller of a single brand of milk to discriminate in price, selling some of his milk below cost, if he is using the profits from his high price sales to finance a deliberate predatory campaign to drive competitors out of business. See, e.g., *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115. Under the court of appeals' theory, however, Section 2(a) would not apply if the seller simply gave the low priced milk a different, unadvertised label, calling it Brand X instead of Brand A. The Commission's particular conclusions on primary line injury in this case are not now before the Court; whether its findings support its conclusions and whether those findings are supported by substantial evidence are

matters that should be decided by the court of appeals in the first instance. We simply point out here that under the court of appeals decision the Commission would be precluded from *ever* applying Section 2(a) to any case of price discrimination, no matter how extreme, where the seller sold the low priced goods under an unadvertised label; the Section would not apply to such cases whether they involved discrimination between customers in the same geographical area or in different geographical markets. *Cf. Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-546.^{8a}

3. Acceptance of the Commission's position that physically identical products that are sold for a higher price under a name brand than under a private brand are of like grade and quality, would not outlaw the practice of selling private brands for less than well advertised name brands. As we have pointed out, the only effect of our interpretation of Section 2(a) is to give the Commission authority to consider, under the pertinent statutory criteria, the effect of such discrimination upon competition. Before a discrimination in price between private and name brands of the identical product would violate the Act, the Commission would have to establish that its effect may be substantially to lessen competition. The respondent could then justify the discrimination if it could show that the lower prices were cost justified, or were made in good faith to meet the equally low price of a com-

^{8a} Some aspects of the problem of injury to primary line competition resulting from discriminations in price between name and private brands are presented in *Utah Pie Company v. Continental Baking Company, et al.*, No. 489, this Term, certiorari granted, November 15, 1965.

petitor. Where, as in the present case, the injury at the secondary line resulted from the seller's refusal to make the private brand actually available to all of its customers, the seller could cure the violation by making it so available, and it would not be required to sell the name brand at the same price as the private brand.*

The Commission recognizes that the wide-spread acceptance of private brands has been due to the fact that ordinarily they are sold for less than name brands. See *supra*, pp. 17-18. It certainly has no intention of prohibiting this wide-spread practice of American merchandising that has enabled millions of consumers to enjoy the benefits of lower prices. But it does strongly believe that the Act authorizes it to prevent *all* price discriminations that have the proscribed anticompetitive effect, whether accomplished through the use of private brands or otherwise; and that treating physically identical goods as of different "grade and quality" merely because a name brand thereof has gained sufficient "commercial acceptance"

* The Commission's order (R. 952-953), which is designed to eliminate the effects of the discrimination upon both the primary and the secondary lines of commerce (R. 127), broadly prohibits respondent from "discriminating in the price of [food] products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher prices or with a customer of the purchaser paying the higher prices." Insofar as secondary line injury is concerned, however, the Commission interprets the order, as it explained in the court of appeals (see the Commission's brief in the court of appeals, copies of which have been filed with the Clerk, pp. 41, 43), as requiring Borden only to offer the private brand evaporated milk to all customers who want it, on terms that would make it actually available to them.

that customers are willing to pay more for it,¹⁰ would seriously weaken the effectiveness of Section 2(a) in preventing the very kind of anticompetitive price discriminations at which it was aimed.

C. THE DECISION BELOW IS CONTRARY TO THE COMMISSION'S WELL-SETTLED INTERPRETATION

The holding below that physically identical goods are not of "like grade and quality" if they are sold at a higher price under one brand than another is contrary to the Commission's well-settled administra-

¹⁰ The court of appeals formulated the test for determining whether a name brand is of different "grade and quality" than a private brand of the identical product as whether the former has "commercially significant distinctions which affect market value" (R. 981). If, as seems likely, the court of appeals meant by this only that a substantial number of customers "are willing to pay more for the product which bears that brand" (R. 982), than the standard is an unrealistic one in terms of the very factor it purports to deem controlling. For the alleged "commercial significance" may itself result solely from the discrimination, *i.e.*, it may reflect only the fact that customers who shop in stores which cannot get the private brand necessarily are required to purchase the name brand. (In the present case, however, some firms that handled the private brand also apparently made substantial sales of the higher-priced Borden brand.) If, on the other hand, the court meant to suggest that in every case the Commission must make an economic analysis of the commercial significance of the particular name brand in the market, the Commission would be required to conduct a vastly complicated and useless inquiry. Among the difficult and often imponderable issues which such an inquiry would entail—in addition to the question, noted above, of what portion of the name brand sales are made by outlets which cannot get the private brand—are the extent of the demand for the name brand at the higher price, and the effect of substantial consumer belief that the name has no, or little, importance to them.

tive interpretation. For many years the Commission has consistently held physically identical goods to be "of like grade and quality" despite the fact that they might be sold at different prices under different labels. *Whitaker Cable Corp.*, 51 F.T.C. 958, 973-975, affirmed, 239 F. 2d 253 (C.A. 7); *Page Dairy Co.*, 50 F.T.C. 395; *United States Rubber Co.*, 28 F.T.C. 1489; *Hansen Inoculator Co., Inc.*, 26 F.T.C. 303; cf. *International Salt Co.*, 49 F.T.C. 138; see also, *The Goodyear Tire & Rubber Co.*, *supra*. "This contemporaneous construction is entitled to great weight * * *" (*Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 391; see *United States v. Americans Trucking Ass'ns.*, 310 U.S. 534, 549).¹¹

The court of appeals, although recognizing that these Commission decisions "all treated goods of dif-

¹¹ The Attorney General's National Committee to Study the Antitrust Laws approved "the Federal Trade Commission's policy of ignoring brands and trade names in determining what are 'goods of like grade and quality' under the Act." Report p. 158. Although some members of the Committee dissented, the majority concluded that "the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test" (*ibid.*). A number of commentators similarly have approved the Commission's interpretation of the Act. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, 39 (2d ed., 1959); Patman, *The Robinson-Patman Act*, 27 (1938); Edwards, *The Price Discrimination Law*, 31, 463-464 (1959); Seidman, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Laws and Techniques*, 409, 424-428 (1963). Contra: Rowe, *Price Discrimination under the Robinson-Patman Act*, 76 (1962); Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

fering brands as being of like grade and quality," distinguished them on the ground that "[i]n none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not"¹² (R. 982).

Apart from the fact that consumers ordinarily will not buy a private brand unless it sells for less than a name brand (see *supra*, pp. 17-18),¹³ these cases show that the Commission consistently has not deemed differences in brand names as significant in determining the "grade and quality" of a commodity under section 2(a). In holding in the present case that such differences may change "grade and quality," the court of appeals has departed from the Commission's settled interpretation of the statute, and this is so even though the Commission decisions did not focus on the "commercial acceptance" of the brand name.

¹² This was the same ground on which the court distinguished its own decision in *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F. 2d 916, 923, a private treble damage action in which it held that national brands of vodka and whiskey were of "like grade and quality" with the same liquors sold under private labels. The court stated (R. 981) that since in *Hartley & Parker* the seller had stated that the lower priced private brands were the same liquors as the higher priced nationally advertised brands, "[t]he label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. * * *

¹³ Three of the Commission cases which the court of appeals cited (*United States Rubber Co.*, 28 F.T.C. 1489; *The Good-*

D. THE COMMISSION'S TREATMENT OF "GRADE AND QUALITY" UNDER SECTION 2(a) IS NOT INCONSISTENT WITH ITS TREATMENT OF THAT ISSUE IN EVALUATING THE "MEETING COMPETITION" DEFENSE UNDER SECTION 2(b)

The court of appeals also concluded (R. 983-984) that the Commission's position on the "like grade and quality" issue under Section 2(a) is inconsistent with its position on the "meeting competition" defense which Section 2(b) provides.¹⁴ The latter section permits a seller to rebut a prima facie case of unlawful price discrimination by showing that the lower price "was made in good faith to meet an equally low price

year Tire & Rubber Co., 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6); *United States Rubber Co.*, 46 F.T.C. 998) involved price discriminations between well-advertised name brands—U.S. Royal Tires, Goodyear Tires, and U.S. Keds (canvas shoes)—and the identical products sold under private labels. As to those discriminations, it obviously could have been shown that consumers were willing to pay more for the name brands than for the private brands, had that factor been deemed relevant.

¹⁴ Section 2(b) of the Robinson-Patman Act provides as follows:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

of a competitor." The Commission has held that a seller whose product ordinarily sells at a premium price cannot justify reducing his price to the level of the non-premium product, because he is thereby not "meeting" but rather is "beating" his competitor's price. See, e.g., *Anheuser-Busch, Inc.*, 54 F.T.C. 277; *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co., Inc., et al.*, CCH Trade Reg. Rep. Transfer Binder, 1963-1965, ¶ 16,800.

There is, however, no inconsistency between the Commission's position on the two issues. In passing upon a seller's meeting-competition defense, the Commission must decide whether the discrimination was made "in good faith" to meet a competitor's equally low price, or whether it was a predatory anti-competitive act. See *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 242. Where a particular brand in fact is able to command a premium price, the fact that the seller discriminatorily drops his price to that of the non-premium item indicates that he is not merely taking a defensive step to keep a customer. For by hypothesis the customer will pay more for the premium than for the non-premium brand. But to recognize that the existence of a consumer preference for a particular brand that is reflected in a higher price is relevant in determining whether a reduction in price to the level of the non-preferred brand is made in good faith, is in no way inconsistent with holding that, under the different standard in Section

2(a), the fact that a particular brand can command a higher price does not give the product a different "grade and quality."¹⁵

¹⁵ Respondent erroneously asserts (Br. in Opp., 12-13; see *id.*, 10) that in the *Callaway Mills* case (cited in the text above) the Commission "categorically held that in order to prove 'grade and quality' attention must be given not only to the 'intrinsic superior quality' of one product over another, but also to the 'intense public demand' that may exist for one product as compared with another." The question in that case was whether Callaway had established that its volume discounts were given in good faith to meet the equally low price of a competitor. The Commission rejected Callaway's "meeting competition" defense. It pointed out that the proponent of such a defense must "identify with particularity both his goods and the competing goods whose price was met," and that Callaway "should have introduced proof as to the comparative quality and saleability of [its] goods and the competitive goods allegedly defended against." CCH Trade Reg. Rep. Transfer Binder (1963-1965) p. 21,755. In other words, in order to evaluate the defense, the Commission had to know whether Callaway was meeting the price of a product of substantially equal public acceptance, and it rejected the defense because Callaway had failed to present such proof. Although the examiner had found that "carpeting made by Callaway to sell at a certain price level is similar in grade and quality to all carpeting made by Callaway's competitors to sell at approximately the same level," the Commission rejected that finding because "[t]here is no showing in this record that respondents' carpets at various price levels were comparable in materials and construction to the carpets of competitors at similar price levels." (*ibid.*)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court to decide the other issues in the case.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE BORDEN COMPANY, *Respondent*

BRIEF FOR THE RESPONDENT

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INDEX

	PAGE
Question Presented -----	1
Statement -----	2
Introduction and Summary -----	9
Argument -----	14
I. The court of appeals correctly held, on the record before it, that private label evaporated milk was not of like grade and quality with Borden brand milk -----	14
A. Congress intended that the market facts as well as the physical facts should be taken into account in determining whether Section 2(a) may have any application -----	14
The language of the statute -----	14
The legislative history -----	17
B. The court of appeals decision is in full accord with every administrative and judicial precedent -----	22
C. The court of appeals decision gives effect to the broader antitrust policies that have been laid down by Congress ---	26
D. The court of appeals decision is in full accord with the overall statutory design	29
II. The court of appeals decision leaves the Commission entirely free to discharge all of its responsibilities under the statute, as Congress intended -----	33
Conclusion -----	36

CITATIONS

PAGE

CASES:

<i>Anheuser-Busch, Inc.</i> , 54 F.T.C. 277 (1957), rev'd, 265 F.2d 677 (7th Cir. 1959), rev'd and remanded to court of appeals, 363 U.S. 536 (1960), Comm'n again rev'd, 289 F.2d 835 (7th Cir. 1961) -----	24
<i>Atalanta Trading Corp. v. FTC</i> , 258 F.2d 365 (2d Cir. 1958) -----	22
<i>Automatic Canteen Co. v. FTC</i> , 346 U.S. 61 (1953) -----	13, 27-28
<i>Borden's Farm Products Co. v. Ten Eyck</i> , 11 F.Supp. 599 (S.D.N.Y. 1935), aff'd, 297 U.S. 251 (1936) -----	15
<i>Callaway Mills Co., Sub nom. Bigelow-Sanford Carpet Co.</i> , CCH TRADE REG. REP. TRANSFER BINDER ¶ 16,800 (FTC Dkt. 7634, Feb. 10, 1964) -----	15-16, 23-24
<i>FTC v. Morton Salt Co.</i> , 334 U.S. 37 (1948) ----	9, 30-33
<i>Gerber Prods. Co. v. Beech-Nut Life Savers, Inc.</i> , 160 F.Supp. 916 (S.D.N.Y. 1958) -----	24
<i>Goodyear Tire & Rubber Co.</i> , 22 F.T.C. 232 (1936), rev'd, 101 F.2d 620 (6th Cir.), cert. denied, 308 U.S. 557 (1939) -----	21, 22, 34
<i>Hansen Inoculator Co. Inc.</i> , 26 F.T.C. 303 (1938)	26
<i>Hartley & Parker, Inc. v. Florida Beverage Corp.</i> , 307 F.2d 916 (5th Cir. 1962) -----	34
<i>International Salt Co.</i> , 49 F.T.C. 138 (1952) ---	26
<i>Minneapolis-Honeywell Regulator Co.</i> , 44 F.T.C. 351 (1948), rev'd, 191 F.2d 786 (7th Cir. 1951), petition for cert. dismissed, 344 U.S. 206 (1952) -----	24
<i>Page Dairy Co.</i> , 50 F.T.C. 395 (1953) -----	26

<i>Standard Oil Co.</i> , 340 U.S. 231 (1951) ; 49 F.T.C. 923 (1953), <i>rev'd</i> , 233 F.2d 649 (7th Cir. 1956), <i>aff'd</i> , 355 U.S. 396 (1958) -----	24, 33
<i>United States Rubber Co.</i> , 28 F.T.C. 1489 (1939)	26
<i>United States Rubber Co.</i> , 46 F.T.C. 998 (1950)	26
<i>Whitaker Cable Corp.</i> , 51 F.T.C. 958 (1955) ----	26

STATUTES:

Clayton Act, Section 2, 38 Stat. 730 (1914) -----	17
Clayton Act as amended by the Robinson-Patman Act:	
Section 2(a), 15 U.S.C. § 13(a) -----	1-2, 10-11, 13, 14, 19, 25, 29
Section 2(b), 15 U.S.C. § 13(b) -----	15, 23, 25
Section 2(f), 15 U.S.C. § 13(f) -----	27

MISCELLANEOUS:

<i>Hearings before the Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act</i> , 74th Cong., 2d Sess., ser. 10, pt. 2 (1936) -----	18, 20-21
<i>Hearings before the House Committee on the Judiciary on Bills to Amend the Clayton Act</i> , 74th Cong., 1st Sess., ser. 10, pt. 1 (1935) -----	18-19
Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) ----	16
Rowe, Price Discrimination Under the Robinson-Patman Act (1962) -----	16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

THE BORDEN COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE BORDEN COMPANY

Question Presented

The respondent manufactured and sold two evaporated milk products: (1) a premium product which consistently commanded a higher price at all levels of distribution, and (2) a chemically identical but commercially less acceptable product which the respondent (like all other producers and handlers of that product) had to sell at lower prices if the product was to be sold at all.

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act applies only to price discrimina-

tion in respect of "commodities of like grade and quality."

The question presented is whether on the record before it the court of appeals correctly held that the premium product and the non-premium product were not of like grade and quality within the meaning of the statute.

Statement

The premium brand market and the private label market. In the market place, Borden brand and private label evaporated milk were sharply different products. Borden brand, on the market for over 70 years, was one of the three premium brands, universally recognized as such throughout the industry. Private label, too, had long been established as a separate entity in the market. Many wholesalers and retailers had their own private labels and the product was packed for them by any one or more of some 25 producing firms (R. 978-79, 19, 145-46, 156-57, 880-84).

All packers of private label sold that product at prices substantially below the premium brand price, for the simple reason that they had to, in order to sell the product at all. All wholesalers and retailers, large and small, expected to get private label for less than the premium brand price, and they knew that they would in turn have to resell private label for less. Private label was not "the same thing" for less money. It was a different product; and the purchasers of private label from the respondent, at the lower prices, continued to buy Borden brand, at the higher prices, in

undiminished quantities (R. 431-34, 478-81, 943). As one of the Commission's wholesaler witnesses put it, at the trial of this case:

"Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk]. . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have \$1.50 or \$2 a case spread to make it interesting." (R. 330-32; quoted by the court of appeals at R. 979)

The amount of the spread, referred to by this witness, was somewhat greater (as the hearing examiner found, R. 54) than any difference between the respondent's prices for Borden brand and its prices for private label.*

The reasons why Borden brand evaporated milk was a premium product. The clear differentiation between the two products, made by wholesalers and retailers, was simply a consequence of the fact that consumers demanded Borden brand and were willing to pay a substantially higher price for it than for the private label product. The reasons for this preference are clear in the record. The consumer confidence in the Borden brand name and in the company behind it was grounded in factors such as long and favorable experience with the Borden product, unfavorable experi-

* The maximum difference claimed by counsel supporting the complaint was \$1.4519 per case (the amount shown at R. 807, line 2, after making the admittedly appropriate deductions, R. 412-16, of \$.1320 for cash discounts and \$.0800 for labels).

ences with private labels, and physicians' recommendations as to the best brand for infant feeding, as well as the respondent's advertising and promotional efforts (R. 978-79, 24-25, 230, 246-47).

Basic to the strong consumer demand for the Borden brand product was the fact that for many years the respondent had taken special pains to make sure that its premium product reached the ultimate consumer in perfect condition. When the respondent in its packing plants put the same milk in the Borden brand and in the private label cans, they were still a long way from the consumer; and evaporated milk is perishable. It must be kept under controlled conditions, and it must not be allowed to remain too long either in storage or on grocers' shelves. Otherwise, it may develop a stale or "canned" taste or become discolored, stringy, curdled or sour. Consumers, unable to test the quality of the contents before making the purchase and opening the can, necessarily place considerable reliance on the brand names and the companies behind them (R. 24-25, 675-76).

To assure the continued high quality of its Borden brand product as it came into the hands of the consumer, the respondent rigorously policed the flow of that product throughout the channels of distribution. Great care was exercised to see that it was stored under optimum conditions and that it was moved toward the consumer with the minimum of delay. First packed, first shipped was the rule, even though that often involved costly shipping from far-away plants or storage warehouses. In addition, the respondent had more than 200 representatives out in the field, going into the

retail stores and making code dating and sampling checks of the freshness of the shelf and storeroom stocks of the Borden brand product (R. 60-61, 493-94, 510-11, 544, 674-76).

With respect to private label, on the other hand, this responsibility lay with the wholesaler and retailer handlers. The respondent simply packed the product as and when instructed by the customer and held it at the packing plant subject to the customer's delivery instructions. The respondent did nothing more, and it took no responsibility for the product after it left the factory door (R. 20-21, 61-62).

The private label product was sold f.o.b. plant, with only the purchaser's label on it. The respondent's name nowhere appeared on it, and any use of the respondent's name in connection with that product was prohibited, both by the respondent and by its private label customers. The respondent wanted it that way because it could not guarantee the ultimate quality of the product and did not wish to risk any tarnishing of its valuable name by reason of anything that might happen to the product in the channels of distribution. The private label customers wanted it that way in order to be in a position to build up their own consumer goodwill and also because they wanted to be free to shift suppliers at any time. The consumers obtained the information important to them: *viz.*, where to place the responsibility in the event that any of the product failed to reach them in good condition (R. 61-62, 485-86, 519-22).

The wholesaler and retailer purchasers of Borden brand and of private label. There were over a hundred wholesalers among the private label customers, as well as a smaller number of chain store warehouses and

retailer-owned buying groups. One of these groups, whose purchases accounted for more than 10% of the respondent's private label volume, had over 1,000 retailer members.* The wholesaler purchasers of private label in turn offered that product to their retailer customers, just as they did the Borden brand which they purchased from the respondent. The evidence, adduced with respect to a particular one of these numerous wholesaler purchasers, shows that it affirmatively offered the private label to each of its 600 retailer customers, some of whom purchased the product and most of whom did not (R. 424, 431-34, 809-15).

As the Commission notes in its brief (page 4), there is no evidence that the respondent refused to sell private label to any purchaser who requested it.**

The proceedings in the Commission. The respondent commenced packing the private label product in a number of its plants in about 1938. The private label was sold on an f.o.b. plant basis, with prices determined under a cost-plus formula. The Borden brand, like the other two premium brands (Carnation and Pet), was sold on a delivered price basis which was uniform throughout the country (R. 19-21, 522-23, 527-28).

The handling of the two different products gave rise to no problem until in 1956 and 1957 the respondent expanded its private label operations to include its two southern plants, located at Lewisburg, Tennessee and

* Central Retailer-Owned Grocers, whose private label purchases are shown at R. 941; see *National Retailer-Owned Grocers, Inc.*, FTC Dkt. 7121, Initial Decision, p. 5 (October 13, 1961), as to the number of members.

** In instances where the respondent did not have the necessary production available when a request was received, such prospective customers were informed when supplies later became available (R. 541-42).

Chester, South Carolina. The respondent's costs at those plants were lower than at its midwestern and other plants, and under its private label pricing formula its customers in the southern area received the benefit of that saving as well as the substantial savings in freight. The result was that some private label business, previously served by other packers from far-away plants in the midwest, shifted to the respondent (R. 32-47). This litigation ensued.

The issues framed by the Commission's complaint (dated April 22, 1958) and the respondent's answer were whether Borden brand and private label were "of like grade and quality", whether the challenged differences in the respondent's prices for the two products were competitively injurious, and whether in any event such price differences were cost-justified.

After a trial extending over a period of almost three years, the hearing examiner ordered the complaint dismissed on the grounds that (a) there was neither injury nor reasonable probability of injury to competition in either the primary or the secondary line (R. 57), and (b) the challenged price differences were cost-justified (R. 74).

The Commission, in a decision joined in by only two of the five Commissioners, with one dissenting and two not participating, held that Borden brand and private label were of like grade and quality, that there was injury to competition in both the primary and secondary line, and that the respondent had not established its cost justification defense (R. 128).

The court of appeals decision that Borden brand and private label were not of like grade and quality. All issues were thoroughly briefed and argued before

the court of appeals, which on December 4, 1964 set the Commission's order aside on the threshold ground that Borden brand and private label were not of like grade and quality within the meaning of the statute (R. 985). It is that holding which is now before this Court for review.

The absence of competitive injury. Although the Commission in its brief (pages 10, 19-20) correctly emphasizes that the competitive injury issues are not before this Court, the Commission's extensive references to those issues necessitate a brief indication of the facts which led the hearing examiner to order the complaint dismissed for lack of competitive injury, and which led the court of appeals to observe, at the close of its opinion, that the respondent's arguments as to the absence of competitive injury "seem to have considerable merit" (R. 985).

As to the claimed injury in the producer or primary line of competition, the evidence showed some shifting of private label business to the respondent at plants where it had the geographic and freight advantage, and some shifting of such business away from the respondent in instances where competitors' plants were more advantageously located. The over-all result was that during the complaint period the testifying competitors, far from losing out, actually increased their market share, sold larger amounts of private label than before, and sold it at higher prices (R. 34-50, 753-88).*

* The competitor who ceased production (Comm. Br. 6) had an almost doubled sales volume in the very year when some of his business shifted to the respondent (which had the geographical advantage in respect of practically all of such shifted business); and that competitor's representative, as the hearing examiner noted, blamed his company's unfavorable geographic location, and not the respondent, for his company's decision to cease production (R. 41-42).

As to the claimed injury in the customer or secondary line of competition, the Commission proceeded on the assumption that, as in *Morton Salt**, the case involved goods which were alike in the market place as well as in physical composition. That assumption was manifestly incorrect, as the record shows and as the hearing examiner recognized; and the record further shows (see pages 30-33 below) that whatever competitive effects might be thought to have flowed from the selling of these two different products at different prices, they were of a totally different kind from those with which Congress was concerned: *viz.*, those resulting from the selling of like goods at different prices.

As to the respondent's cost justification defense, deemed sound by the hearing examiner after many months of litigation on that issue but rejected at the Commission level, the court of appeals observed at the close of its opinion that the respondent's arguments "seem to have considerable merit" (R. 985).

Introduction and Summary

The basic issue, as stated by the court of appeals (R. 979), "is whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination." The court stated that "as a practical matter, such preferences may be far more significant in determining the market value of a product than are its physical characteristics", and that it is "both proper and consistent with the broad antitrust policy of Congress that they be given

* *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

recognition under the 'like grade and quality' test of the Act." The court concluded that

"In determining whether products are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional." (R. 980-81)

Applying that test to the thoroughly demonstrated facts of this case, the court of appeals found it apparent that Borden brand and private label were different products in the market place and therefore not of like grade and quality within the meaning of the statute. The Commission does not question that the market facts proved on this record, if taken into account, do indeed call for that conclusion. The Commission's complaint is that the court should have totally excluded the market facts from consideration.

The effect of the court of appeals decision is to permit the respondent to continue to make private label evaporated milk available to all who want it; to sell that product at prices determined by all the market factors relating to that product; and, in those areas where the proximity of the respondent's plant gives it an advantage over packers shipping from distant plants, to provide cheaper private label for those consumers who want to buy that product.

The effect of an affirmance of the court of appeals decision would be simply to reconfirm that market as well as physical facts are to be taken into account in making the jurisdictional determination under Section 2(a). The Commission would remain entirely free, as

always, to consider each new case on its own facts; and where such facts indicate mere artificial differences rather than the genuinely significant differences shown in this case, the Commission would have full power to deal with every evil at which the Robinson-Patman Act was directed, in precisely the manner intended by Congress.

Contrast, then, the position taken by the Commission before this Court.

The Commission does not and could not question that (a) Congress intended the prohibitions and restrictions of Section 2(a) to be applicable only where different prices are charged for the same product; (b) the threshold question is whether the different prices are being charged for the same product or for different products; and (c) where it is determined that the products are different, that is the end of the inquiry under the statute, and none of the ensuing provisions—competitive injury, meeting competition, cost justification, etc.—has any application.

Yet the Commission now asks this Court to lay down a flat rule that in determining the applicability of this statute no attention shall be paid to any of the market facts—the very facts that are of most crucial significance to actual buyers and sellers of products in the market place. No matter how thoroughly a separate market for a private label product may have been established; no matter how many other producers may be selling in that private label market; no matter how clearly it may be shown that all producers of private label must sell that product at substantially lower than premium product prices, if they are to sell at all; no

matter what plant location or other economic advantages a premium brand producer may be able to make available to wholesalers and retailers wishing to handle the private label product; no matter how many of such wholesalers and retailers may wish to handle the cheaper private label product which can thus be made available to them; no matter what lower prices can thus be brought about for customers who may wish to buy the cheaper private label product—none of this, under the flat exclusionary rule sought by the Commission, would make any difference.

Under that rule, no seller operating in a premium product market could sell private label with an eye solely to the market for that product. At every turn such a seller would have to keep an eye to the competitive fortunes of all other private label producers, being careful not to sell to any wholesaler or retailer in circumstances which might later be claimed to have harmfully diverted business away from some other less advantageously situated private label producer. And at the same time, such a seller would have to keep an eye to the situation of each of his customers, lest for example it later be claimed that a customer to whom sale of private label could not be made for fear of diverting business from some primary line competitor was harmed in his competition with some other customer. In short, under the rule sought by the Commission, no seller operating in a premium product market could compete in a private label market except at the risk of expensive and protracted "injury" and "cost justification" litigation, and under the peril of severe injunc-

tive restrictions, if the Commission in the light of information developed at the trial should formulate conclusions adverse to the seller.

Needless to say, a rule so obviously fostering "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"* should not be adopted unless clearly compelled by the statutory language itself, the legislative history, the over-all statutory design, or established judicial or administrative precedent.

The fact is that every one of these criteria compels the contrary conclusion and supports the decision of the court of appeals. The language of Section 2(a), considered in the light of the statutory purpose and legislative history, shows that the question whether goods are "of like grade and quality" so as to be within the reach of the statute turns upon the facts as to whether the goods have the same value in the market so that they would normally be sold at the same price. Mere physical similarity is not enough if in fact the goods cannot command the same prices in the channels of distribution.

This view of the statute is consistent with all the administrative and judicial precedents and with the design and objectives of the Robinson-Patman Act. It also serves to harmonize that Act with the broader anti-trust policies laid down by Congress by leaving producers free to compete at price levels resulting from the normal play of market forces.

* *Automatic Canteen Co. v. FTC*, 346 U. S. 61, 63 (1953).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD, ON THE RECORD BEFORE IT, THAT PRIVATE LABEL EVAPORATED MILK WAS NOT OF LIKE GRADE AND QUALITY WITH BORDEN BRAND MILK.

A. Congress intended that the market facts as well as the physical facts should be taken into account in determining whether Section 2(a) may have any application.

The language of the statute. The subject matter of Section 2(a) is prices at which commodities are sold. The section, however, is not a general price-fixing or regulatory statute. It deals only with the charging of different prices for "commodities of like grade and quality." Determinations of *grade* and *quality* are essentially value judgments. They have to do with the relative acceptability of goods, which may be based upon physical differences or upon other factors deemed important by buyers and sellers of goods in the market.

Congress desired to protect small buyers against harmful uses of the buying power of large firms, and at the same time did not intend to interfere with the normal competitive processes whereby prices are determined by the actions of buyers and sellers in the market. The statutory language is well designed to carry out these intentions. The jurisdictional phrase limits the prohibitions of the statute to situations where different prices are being charged for goods which all buyers would normally expect to be able to get at the same price. At the same time, the jurisdictional words "make it clear that a seller may charge different prices for

products having significant variations in grade and quality"', and therefore normally selling at different prices.

It is an unquestioned fact that the marketability of a product and the price at which it can be sold depend not only on its physical characteristics but also on the opinion in which buyers hold it. This was brought out by Judge Learned Hand in a decision under another trade regulation statute, handed down at the time when the Robinson-Patman amendment was pending before Congress. Judge Hand emphasized the significance of consumer preferences grounded in considerations other than physical differences, as follows:

"Commercially the [advertised] brands had come to mean a better grade of milk, for the hygienic properties of a product do not fix its commercial quality, but the opinion in which buyers hold it." *Borden's Farm Products Co. v. Ten Eyck*, 11 F. Supp. 599, 600 (S.D.N.Y. 1935), *aff'd*, 297 U.S. 251 (1936)

The Commission itself has recognized the same thing as recently as 1964. In *Callaway Mills*** the Commission pointed out, in a case involving Section 2(b), that a realistic comparison of the pricing of two products must take into account not only the "intrinsic superior quality" of one product over another but also the "intense public demand" that may exist for one product as compared with another. Expressly relating these two distinct considerations to the "grade and

* Comm. Br. 12.

** *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.*, CCH TRADE REG. REP. TRANSFER BINDER ¶ 16,800 (FTC Dkt. 7634, Feb. 10, 1964).

quality" of the products, the Commission assigned to the "quality" concept the "intrinsic" or physical characteristics of a product, and to the "grade" concept the "public demand" or "saleability" characteristics of a product. TRADE REG. REP. TRANSFER BINDER, at p. 21, 755.

Likewise some members of the Attorney General's National Committee to Study the Antitrust Laws, urging that "significant consumer preferences" be taken into account under the grade and quality provision of the statute, regarded demonstrable economic differences as calling for evaluation "under the statutory term 'grade' as distinct from any purely physical consideration of 'quality'."*

To the same effect is Rowe. Pointing out that products are not of like grade and quality if there are commercially significant differences between them, Rowe emphasizes the statutory term "grade" as encompassing these market value factors. Rowe's statement is as follows:

"Considerations of 'quality' aside, the requirement of 'like grade,' whose real import was never legislatively clarified, appears sufficiently plastic to take account of any other commercially significant distinctions—whether physical or promotional differentiations affecting market value. 'Like grade' is thus readily equated with 'commercial fungibility.'

"So construed, the statutory condition of 'like grade' would exempt those non-'fungible' goods differentiated significantly in physical components or promotional appeal." Rowe, Price Discrimination Under the Robinson-Patman Act 76 (1962)

* Report of the Attorney General's National Committee to Study the Antitrust Laws 158 (1955).

Regardless of the precise connotation to be assigned to each of the two terms, the fact that Congress used both terms undoubtedly strengthens the view that Congress intended that the jurisdictional determination should not be limited to the consideration of physical facts alone but should encompass all factors affecting value. The view is further strengthened by the fact that the original Clayton Act permitted a seller to defend his differing prices on the grounds, among others, that the commodities were different in "grade" or in "quality". 38 Stat. 730 (1914). The Robinson-Patman amendment retained both conditions, stated them in the conjunctive and put upon the plaintiff the burden of proof. Thus, under the original Clayton Act the defendant could justify his price discrimination by showing differences in either grade or quality. Under the Robinson-Patman amendment the plaintiff must demonstrate likeness in both grade and quality.

The legislative history. The legislative history, far from providing support for the Commission's contention that all market facts are to be totally excluded from the jurisdictional determination under the statute, shows exactly the contrary. The history shows that "grade" and "quality" remained as separate criteria under the Robinson-Patman Act, and thus that products different in grade or different in quality were not to be deemed of like grade and quality under the statute. Further the history evidences the Congressional concern that the actual facts as to the standing of products in the market place, and not mere rules of thumb based on the presence or absence of physical differences or of

particular brand names, should be controlling. And finally, the history shows that there was specific consideration and approval of the very kind of premium brand-private label operation which the Commission has challenged in this present case.

Mr. Teegarden, generally recognized as the draftsman of the statute (Comm. Br. 14),* explained the significance of market as distinguished from purely physical facts in determining the applicability of the statute, and sharply differentiated between "different grades" on the one hand and "different qualities" on the other, in the following language:

"27. Question. Would the proposed amendment [the Patman bill] require the same prices and terms on purchases for future delivery as on spot purchases either at the time of the contract or at the time of the delivery?"

"Answer. No. The bill does not affect the relationship between future and spot purchases. They are different things and are based on *market conditions* at different times or relating to different times. It would require equal treatment of spot buyers of the same goods at the same time. It would require the equal treatment of future buyers of the same goods, buying at the same time and in the same future. But it leaves open and un-

* Mr. Teegarden, whose authorship of the Patman bill was expressly confirmed by Congressman Patman (*Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess., ser. 10, pt. 1, at 9 (1935)), was active before the various Committees of the Congress throughout the consideration of the legislation, as shown, for example, *id.* at 14-29, 30-39, 200-36, 244-69 and in the *Hearings Before the Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 2d Sess., ser. 10, pt. 2, at 446-70 (1936).

touched the prices and terms relationship between different futures and between spots and futures, just as it does between *different grades and different qualities*. No protection is needed in this respect, since if a seller offers a price differential disproportionate to the real differences involved, the buyer can always choose the future *or the grade or the quality* offering the best price and terms." *Hearings before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess., ser. 10, pt. 1, at 36 (1935) [Italics added.]

The rejection of the "and brands" proposal, relied upon by the Commission at pages 14-15 of its brief, is further evidence that no formalistic rules of thumb were to be employed in the application of the jurisdictional criteria. Under that proposal, Section 2(a) would have been applicable only to the charging of different prices for "commodities of like grade, quality and brand." Obviously the adoption of that proposal would have meant that any difference in brands, regardless of the actual standing of the products in the market place, would have been conclusive and inquiry into the market facts would have been foreclosed. That was of course not the Congressional intention, for as the court of appeals has pointed out in this present case (R. 982), "Different labels may be of no economic significance whatsoever" and "[i]t is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product."

The legislators made it clear that there was to be no change in the status of brands which commanded higher prices, and which for that reason were different in

grade or quality from non-premium brands. The stated reason for rejecting the "and brands" proposal was to prevent discrimination among private label purchasers. Congress, for example, intended that a packer of canned fruit should not be able to sell that product to one large chain under that company's private label at one price, and at the same time charge any other customer a higher price for the product under its private label.

Mr. Teegarden made the following statement on this subject:

"To amend the bill by inserting 'and brands', after the words 'commodities of like grade and quality', as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitations whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A. & P. private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discrimination that he might demand.

"Under the Patman bill as it stands, *manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under*

his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed." *Hearings Before the Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 2d Sess., ser. 10, pt. 2, at 469 (1936) [*Italics added.*]

The attention of Congress could hardly have been focused more specifically upon the precise situation now presented. When the respondent put up evaporated milk under the private labels of the purchasers, and stood ready to do so, under its same cost-plus pricing formula, for each competing purchaser under his private label, it was doing exactly what the chief architect of the Robinson-Patman amendment declared that manufacturers would be free to do thereunder.*

So, too, with the role of *Goodyear*** in the legislative history (Comm. Br. 15-16). It supports the conclusion of the court of appeals, not the Commission's contention. The market facts were gone into on the jurisdictional issue in that case, just as the court of appeals did

* The obviously offhand statement of Mr. Patman ("I only have a very short time, and I must finish my statement. I have not time to discuss that feature . . .") quoted in part at pages 13-14 of the Commission's brief, is in no way inconsistent. The Commission is in error in suggesting that Mr. Patman was speaking of both grade and quality. He spoke solely of "the same quality", and his statement contains no intimation that products of different grades (*e.g.*, a premium brand and a private label) would have to be sold at the same price. The more considered and definitive statement on the same subject, made by the man whose authorship of the Patman bill was expressly confirmed by Congressman Patman, is the one quoted above, expressly sanctioning the very kind of premium brand-private label operation which is involved in the present case.

** *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), *rev'd*, 101 F. 2d 620 (6th Cir.), *cert. denied*, 308 U. S. 557 (1939).

in the present case.* The result was of course different, because the market facts were different.**

B. The court of appeals decision is in full accord with every administrative and judicial precedent.

The court of appeals emphasized in its opinion (R. 982) that different labels may be of great commercial significance or of no economic significance whatever, depending on the facts in each case. As the court put it in *Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371 (2d Cir. 1958), the question is whether the differences between products are merely "artificial" differences or real differences. The issue in that case was whether certain particular pork products, such as "specially packaged gift-wrapped 2¼ and 5 lb. hams," were of like grade and quality with other pork products. In the Commission it had been held that they were, on the ground that "ham is ham"—just as in the present case the Commission has in effect held that evaporated milk is evaporated milk. The court, pointing out among other things that the Commission had failed to take account of the prices at which the products sold, cate-

* FTC Dkt. 2116, Brief of Counsel Supporting the Complaint in Opposition to Respondent's Motion to Dismiss, pp. 2-6; Respondent's Brief in Support of Motion to Dismiss, pp. 5-9.

** In *Goodyear*, the evidence showed that the private label purchaser (Sears) had in fact been trading on Goodyear's name, thus getting from Goodyear the same commercial value that was obtained by Goodyear customers who had paid a higher price for goods bearing Goodyear's name. The Commission found that in the Sears advertisements "the source of supply was described as 'the leading tire manufacturer' or 'the world's foremost tire manufacturer'"; and that "soon after the contract had been made between Sears, Roebuck & Co. and respondent, that fact became known to the trade and somewhat later to a large proportion of the purchasing public." 22 F.T.C. at 295, 297.

gorically rejected the Commission's decision and set its order aside.

To real people in the market place, the substantial premium differential commanded by Borden brand as compared with private label is most assuredly not an artificial difference. Paying substantially more for one product than for another is a very real thing, to any businessman; he will do that only if the higher priced product is actually worth that much more to him in his business. That is precisely what was done by the private label purchasers in the present case. With both products fully available to them, they kept right on buying Borden brand at the higher prices, in undiminished quantities, as well as private label at the lower prices.

Throughout the history of the Robinson-Patman Act the Commission has recognized—as have the courts—that the higher price commanded by a premium product is a very real thing, and not a mere artificial difference. Time and again, in cases involving the closely related “meeting competition” defense under Section 2(b), the Commission has insisted upon taking full cognizance of the premium differential. Without exception, the Commission has held that because of the premium differential existing in the market place, a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition but undercutting it.

The *Callaway Mills* case (pages 15-16 above) is the most recent example. Rejecting that seller's “meeting competition” defense on the ground that it had failed

to prove that its carpeting was "similar in grade and quality" to the carpeting of the competitors whose prices it was meeting, the Commission emphasized that:

"Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods." CCH TRADE REG. REP. TRANSFER BINDER ¶ 16,800, at p. 21755.

Further Commission and court decisions to the same effect include *Standard Oil Co.*, 49 F.T.C. 923 (1953),* *rev'd on other grounds*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958); *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957),** *rev'd*, 265 F.2d 677 (7th Cir. 1959), *rev'd and remanded to court of appeals*, 363 U.S. 536 (1960), *Comm'n again rev'd*, 289 F.2d 835 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948), *rev'd on other grounds*, 191 F.2d 786 (7th Cir. 1951), *petition for cert. dismissed*, 344 U.S. 206 (1952); and *Gerber Prods. Co. v. Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916 (S.D.N.Y. 1958).

In each of those decisions the crucial fact was that the premium product commanded a higher price. In

* "... in the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor." 49 F.T.C. at 952.

** "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market as it has in most of the other markets in the nation. The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market". 54 F.T.C. at 302.

none of them did the result turn on any question whether the higher price was due to a greater public demand for the premium product or to some differences in its composition.

In the present case, the Commission has held that the higher price commanded by a premium product is of no significance and must be disregarded in determining the applicability of the statute. The court of appeals could find no warrant for the Commission's thus "construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case" (R. 984); and the Commission in its brief has advanced none. The Commission's attempt to distinguish the long line of precedents (Comm. Br. 25-27) comes down to nothing but an assertion that the standards under Section 2(b) and Section 2(a) of the same statute are "different". In what respect the standards differ, so as to justify a vigorous pursuit of the market facts under Section 2(b) and a total rejection of them under Section 2(a), the Commission does not say.

Equally unpersuasive is the Commission's assertion (Comm. Br. 22-24) that there is a "well-settled administrative interpretation" which may explain its refusal to consider the market facts in this case. The court of appeals, before which the Commission made the same assertion, pointed out that in none of the cases cited by the Commission "was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower price did not." (R. 981-82). The Com-

mission in its brief does not question the accuracy of that statement. Nor does the Commission quote or refer to any instance where the rule now said to be well settled has been stated by the Commission.

A review of the cited cases yields no enlightenment as to any Commission interpretation, let alone any "well settled" one. One of the cases was a negotiated settlement.* In another, the evidence affirmatively showed that there was no commercial difference between the two products, in that the resale prices of both were the same.** In two more, the Commission indicated doubt whether the labels themselves were readily distinguishable.*** In still another, the Commission stipulated facts showing cost justification, as to all issues involving private labels, and the accompanying finding of "like grade and quality" was obviously pro forma.†

C. The court of appeals decision gives effect to the broader antitrust policies that have been laid down by Congress.

The Commission, at page 21 of its brief, recognizes that the widespread distribution of private label merchandise "has enabled millions of consumers to enjoy

* *United States Rubber Co.*, 28 F.T.C. 1489 (1939).

** *Whitaker Cable Corp.*, 51 F.T.C. 958, 975 (1955).

*** *Hansen Innoculator Co. Inc.*, 26 F.T.C. 303, 308-9 (1938); *Page Dairy Co.*, 50 F.T.C. 395, 397 (1953).

† *United States Rubber Co.*, 46 F.T.C. 998, 1011-12 (1950).

International Salt Co., 49 F.T.C. 138 (1952), to which the Commission makes a "cf." reference, involved no question of different prices for differently labeled goods.

the benefits of lower prices.” It must also be recognized that effective competition and resulting lower prices for private label products depend largely upon the freedom of producers to sell these products at prices determined by the demands and conditions of the private label market. Yet the position advocated by the Commission would limit this freedom. If that position were to prevail, producers of a premium product could not also compete in the private label market except at the risk of litigation under the Robinson-Patman Act.

The reasons asserted by the Commission for a position thus limiting competitive freedom are not unlike the reasons which were unsuccessfully asserted in *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953). There the issue was whether, in a proceeding under Section 2(f) of the Robinson-Patman Act, the Commission or the defending recipient of a lower price had the burden of coming forward with facts as to the seller’s costs and other evidence. The Commission argued that enforcement of the Act would be simplified if that burden were put on the defending recipient rather than on the Commission—just as the Commission in the present case seeks a simple exclusionary rule under which the Commission would not have to consider any of the market facts in determining the applicability of the statute.

This Court rejected the Commission’s contention. It pointed out that the simplified enforcement sought by the Commission “might readily extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.” (*id* at 63.)

The freedom of competition was protected by the Court's refusal to put "the buyer at his peril whenever he engages in price bargaining." (*id* at 73.) The basic point of the decision was that the Robinson-Patman Act should be interpreted and applied consistently "with the broader antitrust policies that have been laid down by Congress." (*id* at 74.)

Similar considerations are applicable here, as the court of appeals noted (R. 980-81). Under the simple rule sought by the Commission, a producer who happened also to be in the premium brand market would be foreclosed from competing, in the private label market, with an eye solely to the market for the private label product. He would in addition have to be mindful of the competitive fortunes and situations of each of his competitors and customers, all at the risk of protracted and expensive litigation and at the peril of severe restrictive orders if it should later be concluded that "the competitive balance" was "shifted" (Comm. Br. 6). The scope of that risk and the reality of the peril are made clear by the long history of this litigation and the sweeping order issued by the Commission (R. 952-53).*

Nothing in the Robinson-Patman Act justifies the conclusion that Congress intended such an impact on

* In its brief (pages 17-18) the Commission goes outside the record for some materials which are said to indicate a more widespread interest in private brand merchandise, generally, than the record facts show with respect to evaporated milk. That, we suggest, would make it even more imperative that all potential producers of private label be permitted to compete fully and effectively in such markets, without being subjected to the restrictions inherent in the exclusionary rule for which the Commission contends in this case.

competition. Section 2(a) of the Robinson-Patman Act, applied in accordance with its terms, imposes restrictions on price differentiation only in those situations where the market itself does not make a differentiation; that is to say, only in those situations where a seller sells to one purchaser at a higher price, and to another purchaser at a lower price, like goods which would normally command the same price.

But where as in this present case the market itself dictates that the products be sold at different prices, and a seller must sell the one at a lower price if he is to sell it at all, the statute has no application whatsoever and imposes no actual or threatened restriction of any kind on a seller's full and effective competition in each of the product markets. He is free to make private label available to all of his customers who want that product, without regard to any effect that that may have on competitors presently supplying any of such customers; and he is free to sell that product at lower prices reflecting and making available for consumers the benefits of plant location and other economic advantages that he may have.

D. The court of appeals decision is in full accord with the overall statutory design.

The statutory design is perfectly clear. Unless products are alike in grade and quality, the statute has no application whatsoever in respect of a seller's pricing of them, and no inquiry under the injury or any of the other provisions of the statute is authorized or contemplated.

As the Commission puts it:

“Congress explicitly did not prohibit a seller from charging less for a different product.” (Pet. Cert. 9) * * * *

“A seller may charge different prices for products having significant variations in grade and quality—such discriminations in price did not pose the kind of competitive injury with which Congress was concerned in the Robinson-Patman Act.” (Comm. Br. 12)

Comparison of this present case with the situation presented in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), relied upon by the Commission (Comm. Br. 17, 19), illustrates the difference in kind between the competitive effects of selling different products at different prices, and the injurious impact of selling the same product at different prices.

In *Morton Salt* the goods sold to competing customers at different prices were alike in the market place as well as in physical composition. This Court, repeatedly characterizing these as “like goods”,* made it clear that one of the things that made them “like goods” was that the brand name was the same: Morton’s “finest brand of table salt, known as Blue Label.” After setting out at page 41 the volume discount schedule applicable to “this brand” and noting that the record in that case showed that there had been only five companies able to purchase at the lowest prices thus provided for, this Court stated that:

“As a result of this low price these five companies have been able to sell Blue Label salt at retail

* 334 U.S. at 45, 47, 50.

cheaper than wholesale purchasers from respondent could reasonably sell *the same brand* of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores."* [Italics added.]

It was self-evident that both groups of customers—those charged the higher prices and those charged the lower prices—would ordinarily expect to pay the same price for that Blue Label salt. It was likewise self-evident that both groups of customers in fact wanted Blue Label salt. They were already buying it. And, as noted in the foregoing quotation from this Court's opinion, the competitive disadvantage to those paying the higher price for that same brand of salt was equally obvious.

In the present case, in total contrast, the goods were quite unlike in the market place. No wholesaler or retailer expected to get Borden brand for the private label price. All wholesalers and retailers carried Borden brand. Their customers demanded it, and it was a necessary part of their stock in trade. Private label was an optional item; some chose to carry it and some did not. Borden brand was a pre-sold item, requiring little selling effort on the part of the handlers. Private label on the other hand required extensive selling and promotional efforts, and the record shows that those who did handle the product did not always

* Following this, this Court at page 41 described the quantity discount system applicable to Morton's "other brands" of table salt, and noted the price differences among purchasers of such other brands.

consider that their efforts had been warranted. On the other hand the mark-ups for the handlers, on Borden brand, were modest, while in some circumstances the handling of private label held out the hope of greater margins. Private label also provided an opportunity for a handler to develop a good will in a product of his own; Borden brand did not (R. 51-57, 431-35, 455-56, 464-65, 478-81).

The hearing examiner, who observed the Commission's wholesaler and retailer witnesses on the stand and analyzed the evidence in detail, found the Commission's case thoroughly unpersuasive and held that there was no competitive injury.* The Commission, proceeding on the erroneous premise that this was another *Morton Salt* case, involving goods which were alike in the market place as well as in physical composition, concluded otherwise. The court of appeals, while not deciding the question, stated that the respondent's arguments in support of the hearing examiner's conclusion "seem to have considerable merit" (R. 985).

For present purposes the important point is that (as the Commission admits) the Congress did not intend

* R. 57. The hearing examiner considered the statements of the Commission's witnesses, referred to at page 7 of its brief, to the effect that they would have been interested in buying private label from the respondent if they had been solicited. He also considered the evidence as to the actual business conduct of these witnesses, including evidence showing that most of them had never handled private label at all, although it had been in distribution in their area for over 30 years, evidence showing that many of the retailer witnesses had failed to buy the product when it was offered to them by wholesalers purchasing from the respondent (or had waited to do so, until shortly before their testimony), etc. (R. 50-57, 288-90).

that any competitive effects flowing from the selling of different products at different prices should be inquired into at all. They are not "the kind" of effects with which Congress was concerned (Comm. Br. 12). And the facts in this case clearly show that where, as here, the products are radically different in the market place, any competitive effects are indeed different in kind from the *Morton Salt* type to which the statute is directed.

We submit that Congress did not intend, on the one hand, to leave a seller free to sell different products at competitively different prices, and then on the other hand to take away that freedom by permitting the Commission to subject the seller to protracted and uncertain litigation about alleged competitive effects. Cf. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

II. THE COURT OF APPEALS DECISION LEAVES THE COMMISSION ENTIRELY FREE TO DISCHARGE ALL OF ITS RESPONSIBILITIES UNDER THE STATUTE, AS CONGRESS INTENDED.

Much of the argument in the Commission's brief is directed to a concern that the decision below may impede the Commission in its handling of other cases which may arise in the future.

The effect of the court of appeals decision, so far as future cases are concerned, is simply to reconfirm that market as well as physical facts are to be taken into account. The decision leaves the Commission free, as always, to consider each new case on its own facts. Where such facts indicate mere artificial differences rather than the genuinely significant differences shown

in this present case, the Commission as always will have full power to deal with every evil at which the Robinson-Patman Act was directed, in precisely the manner intended by Congress.

If examples are needed, the court of appeals has already furnished one. In *Hartley & Parker** the court of appeals found the differently labeled goods to be of like grade and quality. That conclusion, reached on the facts of that case, in no way tied the court's hands in respect of the quite different market facts in the present case; and Judge Rives, who wrote the opinion in *Hartley*, joined in the unanimous decision in the present case.

If and when another *Goodyear* situation arises (see pages 21-22 above), with a single large purchaser of private label buying at a lower price but trading on and getting the benefit of the well-known brand name, nothing in the decision below will hamper the Commission in dealing fully and effectively with that case.

So too, with the hypothetical situation posed at page 19 of the Commission's brief, involving a supposed predatory use accomplished by "simply . . . calling it Brand X instead of Brand A." The court of appeals made it clear that the mere affixing of different labels means nothing at all, because "different labels may be of no economic significance whatsoever" (R. 982). The facts in the present case are totally different, and it is hard to see how the decision below could give rise to any problem in dealing with the hypothetical case if it should arise.

* *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).

But even if it were to be thought that consideration of the market as well as the physical facts might call for some substantial amount of effort on the Commission's part, that could by no means justify the alternative, of which this case is an example: eight years of complex and expensive litigation about competitive effects claimed to have flowed from the differential pricing of products which were radically different in the market place, pursuing the complexities involved in establishing cost justification under the Commission's procedures, etc. Inquiry into the market facts at the outset, as Congress intended, could have obviated all of this with but a small fraction of the time and effort.

Conclusion

The judgment of the court of appeals should be affirmed.

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INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement.....	3
Introduction and summary.....	8
Argument:	
Two products which are otherwise identical are of "like grade and quality" whether sold under a private brand label or at a higher price under the manufacturer's own brand.....	11
A. Congress intended the "grade and quality" of commodities to refer to their physical characteristics, not to consumer preferences attribut- able to brand labels.....	11
1. The language of the statute.....	11
2. The legislative history.....	13
B. The courts of appeals' interpretation of Section 2(a) would remove from the prohibitions of that Section one of the major evils at which it was directed.....	16
C. The decision below is contrary to the Commission's well-settled inter- pretation.....	22

Argument—Continued

Two products, etc.—Continued

	Page
D. The Commission's treatment of "grade and quality" under Section 2(a) is not inconsistent with its treatment of that issue in evaluating the "meeting competition" defense under Section 2(b)-----	25
Conclusion-----	28

CITATIONS

Cases:

<i>Anheuser-Busch, Inc.</i> , 54 F.T.C. 277-----	26
<i>Atalanta Trading Corporation v. Federal Trade Commission</i> , 258 F. 2d 365-----	12
<i>Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co., Inc., et al.</i> , CCH Trade Reg. Rep. Transfer Binder, 1963-1965, ¶ 16,800-----	26, 27
<i>Federal Trade Commission v. Anheuser-Busch, Inc.</i> , 363 U.S. 536-----	10, 20
<i>Federal Trade Commission v. Cement Institute</i> , 333 U.S. 683-----	12
<i>Federal Trade Commission v. Henry Broch & Co.</i> , 363 U.S. 166-----	16
<i>Federal Trade Commission v. Mandel Brothers, Inc.</i> , 359 U.S. 385-----	23
<i>Federal Trade Commission v. Morton Salt Co.</i> , 334 U.S. 37-----	17, 19
<i>Goodyear Tire & Rubber Co., The</i> , 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620-----	15, 23, 24
<i>Hansen Inoculator Co., Inc.</i> , 26 F.T.C. 303-----	23
<i>Hartley & Parker, Inc. v. Florida Beverage Corp.</i> , 307 F. 2d 916-----	24

III

Cases—Continued

	Page
<i>International Salt Co.</i> , 49 F.T.C. 138-----	23
<i>Moore v. Mead's Fine Bread Co.</i> , 348 U.S. 115.....	19
<i>Page Dairy Co.</i> , 50 F.T.C. 395-----	23
<i>Standard Oil Co. v. Federal Trade Commission</i> , 340 U.S. 231-----	26
<i>United States Rubber Co.</i> , 28 F.T.C. 1489-----	23, 24
<i>United States Rubber Co.</i> , 46 F.T.C. 998-----	25
<i>United States v. American Trucking Ass'ns.</i> , 310 U.S. 534-----	23
<i>Whitaker Cable Corp.</i> , 51 F.T.C. 958, affirmed, 239 F. 2d 253-----	23

Statutes:

Clayton Act, Section 2, 38 Stat. 730-----	15
Clayton Act, Section 2, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13:	
Section 2(a)-----	2,
3, 5, 9, 10, 11, 12, 13, 15, 19, 20, 24, 25	
Section 2(b)-----	25
Federal Trade Commission Act, Section 5----	17

Congressional material:

80 Cong. Rec. 8115-----	13
Hearings on H.R. 4995 Before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421, 469-----	14
Hearings on H.R. 4995 Before the House Committee on the Judiciary, 74th Cong., 1st Sess., p. 9-----	14
H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4--	15

Miscellaneous:

<i>Attorney General's National Committee to Study the Antitrust Laws</i> , Report 158-----	23
<i>Austin, Price Discrimination and Related Prob- lems under the Robinson-Patman Act</i> , 39 (2d ed., 1959)-----	23

Miscellaneous—Continued

	Page
<i>Battle of the Brands</i> , Price-Conscious Buyers Help Private Labels Expand Market Share, Wall Street Journal, May 24, 1965, p. 1----	18
" <i>Battle of the Brands, The</i> ," Dun's Review and Modern Industry, May 1964, p. 53-----	17
Cassady & Grether, <i>Proper Interpretation of</i> "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act, <i>The</i> , 30 So. Calif. L. Rev. 241 (1957)-----	23
Edwards, <i>Price Discrimination Law, The</i> (1959):	
P. 31-----	16
Pp. 463-464-----	23
<i>Food Topics</i> , October 1959, pp. 6-7-----	17
<i>How To Save \$200 a Year at a Supermarket</i> , Consumer Reports, February 1961, pp. 64-67-----	18
Patman, <i>Robinson-Patman Act, The</i> , 27 (1938) -	23
Rowe, <i>Price Discrimination under the Robin-</i> <i>son-Patman Act</i> , 76 (1962)-----	23
Seidman, <i>Price Discrimination Cases</i> , reprinted in 2 Hoffman's <i>Antitrust Laws and Tech-</i> <i>niques</i> , 409, 424-428 (1963)-----	23

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE BORDEN COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 975-985) is reported at 339 F. 2d 133. The opinion of the Federal Trade Commission (R. 98-128) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964 (R. 986). On March 4, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 3, 1965 (R. 987). The petition was filed on the latter date and was granted on October 11, 1965 (R. 988). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(a) of the Clayton Act, as amended, prohibits certain discriminations in price involving "commodities of like grade and quality." The question presented is whether products identical in all other respects cease to be of "like grade and quality" when they are sold at a higher price under the manufacturer's nationally advertised brand than under retailers' private brands.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

STATEMENT

The Federal Trade Commission issued a complaint in 1958 charging that since January 1, 1956, the Borden Company ("Borden") had discriminated in price in selling evaporated milk, in violation of Section 2(a) of the Clayton Act, as amended. The Commission alleged that respondent sold the identical evaporated milk under private labels at lower prices than it sold its "Borden" brand milk, and that the effect of such price discrimination may be substantially to lessen competition with Borden's own competitors ("primary line injury"), and with competitors of Borden's favored purchasers ("secondary line injury") (R. 1-5).

Borden is one of three companies which sell evaporated milk under a nationally advertised brand name (R. 99).¹ Evaporated milk also is produced and distributed under private brands by chain stores and by small processors for sale under the brands of their customers (R. 99-100). All of these producers competed with Borden in the sale of evaporated milk (R. 100).

Respondent sells its Borden brand at the same delivered price throughout the United States; it sells this brand primarily to wholesalers or jobbers, and to chain stores (R. 78). In addition, since 1938 it has distributed evaporated milk under the private brands of its purchasers. It sold such milk at prices which were net f.o.b. at its processing plant, and such prices

¹ The two others are the Pet Milk Company and the Carnation Company (R. 99).

varied from plant to plant and from month to month (R. 79). During the period covered by the complaint, "the f.o.b. price of respondent's private label evaporated milk at its various plants was consistently and substantially lower than the delivered price of respondent's Borden brand evaporated milk" (R. 80). The "physical composition" and "quality" of the private brand evaporated milk were the same as those of the Borden brand (R. 79-80).

There is no evidence in the record that Borden refused to sell private brand evaporated milk to any purchaser who specifically requested it.² But Borden never offered the private brand milk to its customers generally. Indeed, its merchandising manager in May, 1957, explained that Borden's policy was that "Our Brokers *should not* bring up the subject [of private label evaporated milk] themselves. * * * We do *not* wish Brokers to solicit such business" (emphasis in original; R. 743). A few months later, he stated that "We certainly don't want to end up by soliciting a bunch of 'peanut' accounts." (R. 827).

Wholesalers and retailers testified that they would have purchased the Borden private brand evaporated milk, but that it was not made available to them. (R. 207, 222, 223, 279, 280, 297, 304, 320, 321, 329, 340, 341, 352-353, 364, 372, 373, 387. See, also, R. 241). Two of the wholesalers were told by their brokers that the latter knew nothing about the availability of the private brand (R. 321, 329, 392).

² Although the examiner found that there was "no evidence that any purchaser was, for any reason, denied the right to buy private-label evaporated milk from the Respondent" (R. 54), the Commission vacated his decision (R. 128).

Many of these wholesalers and retailers viewed the private brand as an aid in competing with the large chains (R. 207, 241-242, 280, 304, 321, 322, 365). Thus, an official of a wholesale grocery company which was owned by retailers explained that "it would have enabled us, possibly, to have had a label or a milk that we could have met chain store competition with on their private labels" (R. 280).

After full administrative proceedings, the Commission held that the respondent had violated Section 2(a) as charged, and entered a cease-and-desist order (R. 98-128).³ Following its prior decisions that "goods which are the same in all respects except label are * * * goods of like grade and quality" (R. 101-102), the Commission ruled that since, as respondent conceded, the Borden brand and the private brands of evaporated milk were "physically * * * alike" (R. 100-101),⁴ they were "commodities of like grade and quality" within the meaning of Section 2(a). The Commission further found that the price differentials

³ Commissioner Elman dissented without opinion, and Commissioners Anderson and Higginbotham did not participate (R. 128).

⁴ The Commission found (R. 79-80) that "there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices."

constituted "discrimination" (R. 105-106), that the discriminations threatened competitive injury in both the primary and secondary lines (R. 106-120), and that they were not cost justified (R. 126).⁵

In finding injury to competition in the primary line (competitors of Borden), the Commission pointed out that the evaporated milk industry has suffered a decline in sales (R. 107); that since 1950 at least ten concerns, mostly in the Midwest market area involved in the case, have discontinued production of evaporated milk and that no new concerns are coming into the business (R. 115, 107-108); that because of the competitive situation of respondent and its competitors in the Midwest market area, "little is needed to shift the competitive balance" (R. 115); that, in contrast to its competitors, the respondent is "a large and powerful concern" (R. 114); and that respondent entered the market using "a discriminatory pricing structure" which "put a severe strain on the smaller competitors," at least one of which went out of business as a result and all of which permanently lost "large and important" accounts to respondent (R. 115, 111). The Commission concluded (R. 115) that "[i]n this market setting, respondent's price discrimination is a clear threat to the entire competition provided by

⁵ The examiner had held that the Borden brand and the private brands were of like grade and quality and that the price differentials constituted discriminations (R. 21-22, 31). He further held, however, that the discriminations did not result in competitive injury at either level of competition (R. 50, 57) and that in any event the discriminations were cost justified (R. 74). He therefore recommended that the complaint be dismissed (R. 74). The Commission vacated the examiner's decision and issued its own findings and conclusions (R. 128, 76-97).

the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely."

The Commission's finding that respondent's price discriminations also injured competition in the secondary line (competitors of the Borden customers who received the lower prices) rested on the testimony that retailers and wholesalers who purchased the Borden brand would have bought the substantially lower-priced private label milk if it had been made available to them (*supra*, p. 4); and that, because of "the extremely low or nonexistent profit margins on evaporated milk" (R. 117), the unavailability of this lower-priced product subjected them to a substantial competitive disadvantage (R. 116-120; see R. 741-743).

The court of appeals set aside the Commission's order. It held that although the products sold under the Borden brand and under the private labels had the same "physical properties," the products were not of "like grade and quality" because the "Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution" (R. 978). The court stated that the issue "is purely one of law, turning on the proper construction of the statutory phrase 'of like grade and quality,' " namely, "whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination" (R. 977, 979). It ruled (R. 981) that "[i]n determining whether products

are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional"; and that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden Company through its brand name." (R. 983). In view of its ruling on the statutory issue the court found it unnecessary to consider any of the other questions in the case (R. 985).

INTRODUCTION AND SUMMARY

The court of appeals noted (R. 978) that the Borden brand and the private brand cans of evaporated milk "are packed exactly the same" except for the difference in labels, and that it was "undisputed" that "the chemical content of the products is identical." The court further conceded (R. 982) that "the mere affixing of different labels to physically identical products is [not] sufficient to make them different in grade * * *." It held (*ibid.*), however, that "when those labels are proven to have demonstrable commercial significance * * * [then] they can change the grade of a product." In other words, under the court of appeals' theory the grade and quality of goods depend upon not only their physical characteristics, but also upon the extent of consumer acceptance of the brand name under which they are sold; and physically identical goods cease to be of the same "grade and quality" if the advertised "label enjoys a significant consumer acceptance such that buyers are

willing to pay more for the product which bears that brand" (R. 982).

The effect of this ruling is to remove from the coverage of Section 2(a) of the Robinson-Patman Act virtually all discriminations in price between physically identical commodities that are sold under both a well-advertised brand name and a private label. For it is common knowledge that private brands today are used principally by large retail distributors as a means for selling widely-used products at prices below those of the well-known, extensively advertised brands. The effect of the court of appeals' interpretation of the "like grade and quality" clause is that, no matter how substantial the price differential between the manufacturer's brand and the private brand may be, and no matter how serious a competitive injury the discrimination may cause, the Commission is denied any authority to deal with such anticompetitive practices under Section 2(a). On the other hand, the Commission's settled view that the "grade and quality" of a commodity depend solely upon its physical characteristics and not upon the extent to which the public has been persuaded to pay more for a particular brand, permits the Commission fully to examine and evaluate the effect of the discrimination upon competition under the statutory criteria governing that issue. Thus, the court of appeals' conclusion (R. 983) that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden company through its brand

name" does not justify its interpretation of "like grade and quality." The "value in the evaporated milk market" of the Borden brand name can be given whatever weight it is entitled to in determining the competitive effect of Borden's price discriminations—an issue upon which the court of appeals has not yet passed and which therefore is not now before this Court. *Cf. Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542.

An interpretation of Section 2(a) that has such unfortunate consequences should not be made unless clearly compelled by the language itself, the legislative history, or the overall statutory design. We shall show, however, that all three of these factors compel the contrary conclusion, *i.e.*, they show that Congress intended the "grade and quality" of a commodity to relate only to its physical characteristics and not to consumer preferences based upon brand names that are reflected in the higher prices that particular brands can command in the marketplace. More particularly, we shall show that Congress specifically considered and rejected the suggestion that differences in the brand names under which the same commodity is sold would make them of different "grade and quality"; that treating such differences in consumer preferences as differences in "grade and quality" would prevent the Commission from dealing under Section 2(a) with one of the major evils at which that section was directed; and that the court of appeals' construction of the statute is contrary to the Commission's settled interpretation.

ARGUMENT

TWO PRODUCTS WHICH ARE OTHERWISE IDENTICAL ARE OF "LIKE GRADE AND QUALITY" WHETHER SOLD UNDER A PRIVATE BRAND LABEL OR AT A HIGHER PRICE UNDER THE MANUFACTURER'S OWN BRAND

A. CONGRESS INTENDED THE "GRADE AND QUALITY" OF COMMODITIES TO REFER TO THEIR PHYSICAL CHARACTERISTICS, NOT TO CONSUMER PREFERENCES ATTRIBUTABLE TO BRAND LABELS

1. *The language of the statute.* Section 2(a) prohibits certain discriminations in price between purchasers of commodities of like grade and quality. In common parlance, two commodities are of "like grade and quality" when they are the same. "Grade and quality" involve a commodity's inherent characteristics, not the price at which it is sold. The fact that a particular brand name is so well accepted by consumers that some are willing to pay more for the identical product when sold under that name than when sold under a less well known label does not change the "grade and quality" of the product. "[G]rade and quality" remain the same no matter what brand name the commodity is sold under or how much more some consumers are willing to pay for it. The change is in consumer "acceptance" of, or "preference" for, the particular brand, which change is reflected in consumer willingness to pay a higher price therefor.

In the present case the raw milk, the canning processes, the cans and the final product (the evaporated milk) are concededly identical; the only difference is the label which respondent affixes to the cans. Because respondent has extensively advertised its Borden brand, many consumers are willing to pay more

for an identical can of evaporated milk that bears the Borden label than they are willing to pay for the same can when it has a private label. But if such consumers knew that they were buying the identical product under the Borden label, they would hardly conclude that they were obtaining a product of superior "grade and quality" merely because the extensive advertising of that brand enables respondent to sell it at a higher price.

"[D]iscrimination in price," as used in Section 2(a), means "selling the *same kind of goods* cheaper to one purchaser than to another" (*Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 721) (emphasis added). The limitation of the statutory prohibition to discriminations involving commodities of "like grade and quality" serves important functions. On the one hand, it makes it clear that a seller may charge different prices for products having significant variations in grade and quality—such discriminations in price did not pose the kind of competitive injury with which Congress was concerned in the Robinson-Patman Act. On the other hand, the limitation prevents "emasculat[i]on of the section by a supplier's making artificial distinctions in his product"⁶ which do not really change its grade and quality. It also reflects the fact that any attempt to measure the economic significance of price discriminations between different grades and qualities of the same product would entail an almost impossible in-

⁶ *Atalanta Trading Corporation v. Federal Trade Commission*, 258 F. 2d 365, 371 (C.A. 2).

quiry. If, for example, the Borden brand of evaporated milk had a 75 percent higher fat content than the private brand and contained additional vitamins, it would be almost impossible to determine whether the higher price of the Borden brand merely reflected those facts. By restricting Section 2(a) to discriminations involving commodities of like grade and quality, Congress wisely provided a simple test for determining the threshold applicability of the Act.

2. *The legislative history.* The legislative history confirms that Congress used the words "like grade and quality" in their normal sense of referring to the physical characteristics of goods, and not to their selling price. The history shows that Congress was aware that chain stores had used private brands to gain an unfair competitive advantage over their smaller competitors; and that it intended to prohibit sellers from discriminating in the prices at which they sold the same product, whether they sold it under a name brand or under a private brand.

Thus, during the debate in the House, Representative Patman, one of the sponsors of the legislation, explained that differences in brand were irrelevant in determining whether goods were of "like grade and quality" (80 Cong. Rec. 8115, emphasis added):

Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for particular chain stores. Is there anything in this bill calculated to remedy that situation?

Mr. PATMAN. * * * I have not time to discuss that feature, but the bill will protect the

independents in that way, because *they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package*, and this will remedy the situation to which the gentleman refers.

Mr. TAYLOR of South Carolina. *Irrespective of the brand.*

Mr. PATMAN. *Yes; so long as it is the same quality.* * * *

Indeed, the House Committee rejected a proposed amendment that would have limited the Act to price discriminations with respect to commodities of "like grade and quality and brands." Hearings on H.R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421. Mr. Teegarden, Counsel to the United States Wholesale Grocers' Association and generally regarded as the author of the Act (Hearings, *supra*, 1st Sess., p. 9), strongly objected to the proposal. In a letter to the Committee, he stated (*id.*, 2d Sess., at 469):

To amend the bill by inserting "and brands," after the words "commodities of like grade and quality," as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent

could use an A & P private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed.

The House Committee report quoted from the Commission's decision in *The Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6), where the Commission had held that Goodyear violated Section 2(a) by selling to Sears, Roebuck & Co. under the latter's private brand the same tires which it sold at higher prices under its own brand name. H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4. The *Goodyear* case also was referred to frequently during the hearings (House Hearings, *supra*, pp. 337, 355, 472, 473). Although that case was decided under Section 2 as it read prior to the Robinson-Patman Act, the earlier statute had a similar provision relating to "grade" and "quality."⁷

⁷In the original Clayton Act, Section 2 broadly prohibited discriminations in price that threatened competitive injury. A proviso permitted price discriminations "on account of differ-

Thus, the Committee was aware of the Commission's view that differences in brand did not change the grade or quality of a commodity; and, in the light of the other legislative history already discussed, the Congressional intention to make "grade and quality" turn solely upon physical characteristics is plain.

In short, as Professor Corwin Edwards, one of the leading commentators on the Act, has stated, "it is evident that the wording was carefully chosen to prevent price concessions to large distributors who sold commodities under their own private brands." Edwards, *The Price Discrimination Law*, 31 (1959).

B. THE COURTS OF APPEALS' INTERPRETATION OF SECTION 2(a)
 WOULD REMOVE FROM THE PROHIBITIONS OF THAT SECTION ONE
 OF THE MAJOR EVILS AT WHICH IT WAS DIRECTED

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit *all devices* by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission v. Henry Brock & Co.*, 363 U.S. 166, 168, emphasis added). The granting to large buyers of discriminatorily lower prices for private brand merchandise can be just such a device.

ences in the grade, quality, or quantity of the commodity sold * * *." 38 Stat. 730.

The fact that the original Clayton Act used the terms "grade and quality" in the disjunctive, and the Robinson-Patman Act uses them in the conjunctive, is of no significance. There is nothing to show that Congress intended thereby any change in the substantive standards. On the contrary, as developed in the text above, the legislative history demonstrates that Congress did not intend a change in brand name to constitute a change in the "grade and quality" of a commodity.

Thus, the effect of the court of appeals' decision is to bar the Commission at the threshold from dealing with one of the major evils at which the statute was directed.⁸

1. Price discriminations can take many forms. They are just as anticompetitive if accomplished by giving a lower price on the same commodity when sold under a private brand than when sold under a name brand, as when done through a price differential on the same brand. In either situation the purchaser who does not have the benefit of the discriminatorily lower price is under an obvious competitive disadvantage as against the purchaser who does. Cf. *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46-47.

A retailer who can offer his customers the lower-priced private brand has a significant advantage over his competitors who cannot do so. For there are today a tremendous number of customers who prefer the cheaper private brands over the more expensive well-known ones. It has been estimated that in the past ten years the volume of business accounted for by private brands has doubled (*The Battle of the Brands*, Dun's Review and Modern Industry, May 1964, p. 53); six years ago it was reported that such brands accounted for more than 25 percent of the food sales in supermarkets (*Food Topics*, October 1959, pp.

⁸ We are not suggesting that the Commission could not also deal with this problem under Section 5 of the Federal Trade Commission Act. In the present case, however, the Commission elected to proceed under the narrower provisions of the Clayton Act, which specifically deal with price discrimination.

6-7). See, also, *Battle of the Brands*, Price-Conscious Buyers Help Private Labels Expand Market Share, Wall Street Journal, May 24, 1965, p. 1. Some of these customers are willing to accept what they consider to be an inferior product just because it is cheaper. But a growing number of consumers has come to realize that in many cases the lower-priced private brand merchandise is just as good as the higher-priced name brand goods. See Wall Street Journal article, *supra*. Large organizations of consumers, as well as cooperative groups, devote themselves to the identification of such private brand bargains. See *How To Save \$200 a Year at a Supermarket*, Consumer Reports, February 1961, pp. 64-67.

A retailer who cannot satisfy the large public demand for these lower-priced private brand goods obviously cannot compete effectively with a retailer who can offer them. Where the private label merchandise is in fact made available only to large purchasers, the inevitable result is to injure their smaller competitors. Indeed, the ability of the large retailers to offer the lower-priced private label brands causes competitive injury not only in the market for the particular product but also in the broader sense that the favored retailers can create or enhance a general reputation for selling generally at lower prices than the smaller stores. See R. 93. In this case many wholesale and retail grocers testified that they would have purchased respondent's private brand evaporated milk had it been made available to them, to enable them to compete more effectively with the large retailers who had such private brand. See the Statement, *supra*, pp. 4-5.

Thus, respondent's price discriminations involved the very kind of anticompetitive situation that the statute sought to reach. "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 43.

2. A seller may also use an unadvertised brand in order to engage in price discrimination designed to injure his competitors (primary line injury). Clearly it would be illegal under Section 2(a) for a seller of a single brand of milk to discriminate in price, selling some of his milk below cost, if he is using the profits from his high price sales to finance a deliberate predatory campaign to drive competitors out of business. See, e.g., *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115. Under the court of appeals' theory, however, Section 2(a) would not apply if the seller simply gave the low priced milk a different, unadvertised label, calling it Brand X instead of Brand A. The Commission's particular conclusions on primary line injury in this case are not now before the Court; whether its findings support its conclusions and whether those findings are supported by substantial evidence are

matters that should be decided by the court of appeals in the first instance. We simply point out here that under the court of appeals decision the Commission would be precluded from *ever* applying Section 2(a) to any case of price discrimination, no matter how extreme, where the seller sold the low priced goods under an unadvertised label; the Section would not apply to such cases whether they involved discrimination between customers in the same geographical area or in different geographical markets. *Cf. Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-546.^{8a}

3. Acceptance of the Commission's position that physically identical products that are sold for a higher price under a name brand than under a private brand are of like grade and quality, would not outlaw the practice of selling private brands for less than well advertised name brands. As we have pointed out, the only effect of our interpretation of Section 2(a) is to give the Commission authority to consider, under the pertinent statutory criteria, the effect of such discrimination upon competition. Before a discrimination in price between private and name brands of the identical product would violate the Act, the Commission would have to establish that its effect may be substantially to lessen competition. The respondent could then justify the discrimination if it could show that the lower prices were cost justified, or were made in good faith to meet the equally low price of a com-

^{8a} Some aspects of the problem of injury to primary line competition resulting from discriminations in price between name and private brands are presented in *Utah Pie Company v. Continental Baking Company, et al.*, No. 489, this Term, certiorari granted, November 15, 1965.

petitor. Where, as in the present case, the injury at the secondary line resulted from the seller's refusal to make the private brand actually available to all of its customers, the seller could cure the violation by making it so available, and it would not be required to sell the name brand at the same price as the private brand.*

The Commission recognizes that the wide-spread acceptance of private brands has been due to the fact that ordinarily they are sold for less than name brands. See *supra*, pp. 17-18. It certainly has no intention of prohibiting this wide-spread practice of American merchandising that has enabled millions of consumers to enjoy the benefits of lower prices. But it does strongly believe that the Act authorizes it to prevent *all* price discriminations that have the proscribed anticompetitive effect, whether accomplished through the use of private brands or otherwise; and that treating physically identical goods as of different "grade and quality" merely because a name brand thereof has gained sufficient "commercial acceptance"

* The Commission's order (R. 952-953), which is designed to eliminate the effects of the discrimination upon both the primary and the secondary lines of commerce (R. 127), broadly prohibits respondent from "discriminating in the price of [food] products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher prices or with a customer of the purchaser paying the higher prices." Insofar as secondary line injury is concerned, however, the Commission interprets the order, as it explained in the court of appeals (see the Commission's brief in the court of appeals, copies of which have been filed with the Clerk, pp. 41, 43), as requiring Borden only to offer the private brand evaporated milk to all customers who want it, on terms that would make it actually available to them.

that customers are willing to pay more for it,¹⁰ would seriously weaken the effectiveness of Section 2(a) in preventing the very kind of anticompetitive price discriminations at which it was aimed.

C. THE DECISION BELOW IS CONTRARY TO THE COMMISSION'S WELL-SETTLED INTERPRETATION

The holding below that physically identical goods are not of "like grade and quality" if they are sold at a higher price under one brand than another is contrary to the Commission's well-settled administra-

¹⁰ The court of appeals formulated the test for determining whether a name brand is of different "grade and quality" than a private brand of the identical product as whether the former has "commercially significant distinctions which affect market value" (R. 981). If, as seems likely, the court of appeals meant by this only that a substantial number of customers "are willing to pay more for the product which bears that brand" (R. 982), than the standard is an unrealistic one in terms of the very factor it purports to deem controlling. For the alleged "commercial significance" may itself result solely from the discrimination, *i.e.*, it may reflect only the fact that customers who shop in stores which cannot get the private brand necessarily are required to purchase the name brand. (In the present case, however, some firms that handled the private brand also apparently made substantial sales of the higher-priced Borden brand.) If, on the other hand, the court meant to suggest that in every case the Commission must make an economic analysis of the commercial significance of the particular name brand in the market, the Commission would be required to conduct a vastly complicated and useless inquiry. Among the difficult and often imponderable issues which such an inquiry would entail—in addition to the question, noted above, of what portion of the name brand sales are made by outlets which cannot get the private brand—are the extent of the demand for the name brand at the higher price, and the effect of substantial consumer belief that the name has no, or little, importance to them.

tive interpretation. For many years the Commission has consistently held physically identical goods to be "of like grade and quality" despite the fact that they might be sold at different prices under different labels. *Whitaker Cable Corp.*, 51 F.T.C. 958, 973-975, affirmed, 239 F. 2d 253 (C.A. 7); *Page Dairy Co.*, 50 F.T.C. 395; *United States Rubber Co.*, 28 F.T.C. 1489; *Hansen Inoculator Co., Inc.*, 26 F.T.C. 303; cf. *International Salt Co.*, 49 F.T.C. 138; see also, *The Goodyear Tire & Rubber Co.*, *supra*. "This contemporaneous construction is entitled to great weight * * *" (*Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 391; see *United States v. Americans Trucking Ass'ns.*, 310 U.S. 534, 549).¹¹

The court of appeals, although recognizing that these Commission decisions "all treated goods of dif-

¹¹ The Attorney General's National Committee to Study the Antitrust Laws approved "the Federal Trade Commission's policy of ignoring brands and trade names in determining what are 'goods of like grade and quality' under the Act." Report p. 158. Although some members of the Committee dissented, the majority concluded that "the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test" (*ibid.*). A number of commentators similarly have approved the Commission's interpretation of the Act. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, 39 (2d ed., 1959); Patman, *The Robinson-Patman Act*, 27 (1938); Edwards, *The Price Discrimination Law*, 31, 463-464 (1959); Seidman, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Laws and Techniques*, 409, 424-428 (1963). Contra: Rowe, *Price Discrimination under the Robinson-Patman Act*, 76 (1962); Cassidy & Grether, *The Proper Interpretation of "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

fering brands as being of like grade and quality," distinguished them on the ground that "[i]n none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not"¹² (R. 982).

Apart from the fact that consumers ordinarily will not buy a private brand unless it sells for less than a name brand (see *supra*, pp. 17-18),¹³ these cases show that the Commission consistently has not deemed differences in brand names as significant in determining the "grade and quality" of a commodity under section 2(a). In holding in the present case that such differences may change "grade and quality," the court of appeals has departed from the Commission's settled interpretation of the statute, and this is so even though the Commission decisions did not focus on the "commercial acceptance" of the brand name.

¹² This was the same ground on which the court distinguished its own decision in *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F. 2d 916, 923, a private treble damage action in which it held that national brands of vodka and whiskey were of "like grade and quality" with the same liquors sold under private labels. The court stated (R. 981) that since in *Hartley & Parker* the seller had stated that the lower priced private brands were the same liquors as the higher priced nationally advertised brands, "[t]he label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. * * *"

¹³ Three of the Commission cases which the court of appeals cited (*United States Rubber Co.*, 28 F.T.C. 1489; *The Good-*

D. THE COMMISSION'S TREATMENT OF "GRADE AND QUALITY" UNDER SECTION 2(a) IS NOT INCONSISTENT WITH ITS TREATMENT OF THAT ISSUE IN EVALUATING THE "MEETING COMPETITION" DEFENSE UNDER SECTION 2(b)

The court of appeals also concluded (R. 983-984) that the Commission's position on the "like grade and quality" issue under Section 2(a) is inconsistent with its position on the "meeting competition" defense which Section 2(b) provides.¹⁴ The latter section permits a seller to rebut a *prima facie* case of unlawful price discrimination by showing that the lower price "was made in good faith to meet an equally low price

year Tire & Rubber Co., 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6); *United States Rubber Co.*, 46 F.T.C. 998) involved price discriminations between well-advertised name brands—U.S. Royal Tires, Goodyear Tires, and U.S. Keds (canvas shoes)—and the identical products sold under private labels. As to those discriminations, it obviously could have been shown that consumers were willing to pay more for the name brands than for the private brands, had that factor been deemed relevant.

¹⁴ Section 2(b) of the Robinson-Patman Act provides as follows:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the *prima-facie* case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the *prima-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

of a competitor." The Commission has held that a seller whose product ordinarily sells at a premium price cannot justify reducing his price to the level of the non-premium product, because he is thereby not "meeting" but rather is "beating" his competitor's price. See, e.g., *Anheuser-Busch, Inc.*, 54 F.T.C. 277; *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co., Inc., et al.*, CCH Trade Reg. Rep. Transfer Binder, 1963-1965, ¶ 16,800.

There is, however, no inconsistency between the Commission's position on the two issues. In passing upon a seller's meeting-competition defense, the Commission must decide whether the discrimination was made "in good faith" to meet a competitor's equally low price, or whether it was a predatory anti-competitive act. See *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 242. Where a particular brand in fact is able to command a premium price, the fact that the seller discriminatorily drops his price to that of the non-premium item indicates that he is not merely taking a defensive step to keep a customer. For by hypothesis the customer will pay more for the premium than for the non-premium brand. But to recognize that the existence of a consumer preference for a particular brand that is reflected in a higher price is relevant in determining whether a reduction in price to the level of the non-preferred brand is made in good faith, is in no way inconsistent with holding that, under the different standard in Section

2(a), the fact that a particular brand can command a higher price does not give the product a different "grade and quality."¹⁵

¹⁵ Respondent erroneously asserts (Br. in Opp., 12-13; see *id.*, 10) that in the *Callaway Mills* case (cited in the text above) the Commission "categorically held that in order to prove 'grade and quality' attention must be given not only to the 'intrinsic superior quality' of one product over another, but also to the 'intense public demand' that may exist for one product as compared with another." The question in that case was whether Callaway had established that its volume discounts were given in good faith to meet the equally low price of a competitor. The Commission rejected Callaway's "meeting competition" defense. It pointed out that the proponent of such a defense must "identify with particularity both his goods and the competing goods whose price was met," and that Callaway "should have introduced proof as to the comparative quality and saleability of [its] goods and the competitive goods allegedly defended against." CCH Trade Reg. Rep. Transfer Binder (1963-1965) p. 21,755. In other words, in order to evaluate the defense, the Commission had to know whether Callaway was meeting the price of a product of substantially equal public acceptance, and it rejected the defense because Callaway had failed to present such proof. Although the examiner had found that "carpeting made by Callaway to sell at a certain price level is similar in grade and quality to all carpeting made by Callaway's competitors to sell at approximately the same level," the Commission rejected that finding because "[t]here is no showing in this record that respondents' carpets at various price levels were comparable in materials and construction to the carpets of competitors at similar price levels." (*ibid.*)

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court to decide the other issues in the case.

Respectfully submitted.

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NOVEMBER 1965.

SUPREME COURT OF THE UNITED STATES

No. 106.—OCTOBER TERM, 1965.

Federal Trade Commission,	} On Writ of Certiorari to	
Petitioner,		the United States Court
v.		of Appeals for the Fifth
The Borden Company.	} Circuit.	

[March 23, 1966.]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Borden Company, respondent here, produces and sells evaporated milk under the Borden name, a nationally advertised brand. At the same time Borden packs and markets evaporated milk under various private brands owned by its customers. This milk is physically and chemically identical with the milk it distributes under its own brand but is sold at both the wholesale and retail level at prices regularly below those obtained for the Borden brand milk. The Federal Trade Commission found the milk sold under the Borden and the private labels to be of like grade and quality as required for the applicability of § 2 (a) of the Robinson-Patman Act,¹ held the price differential to be discriminatory

¹Section 2 (a) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (a) (1964 ed.), provides in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to

within the meaning of the section, ascertained the requisite adverse effect on commerce, rejected Borden's claim of cost justification and consequently issued a cease-and-desist order. The Court of Appeals set aside the Commission's order on the sole ground that as a matter of law, the customer label milk was not of the same grade and quality as the milk sold under the Borden brand. 339 F. 2d 133. Because of the importance of this issue, which bears on the reach and coverage of the Robinson-Patman Act, we granted certiorari. 382 U. S. 807. We now reverse the decision of the Court of Appeals and remand the case to that court for the determination of the remaining issues raised by respondent Borden in that court. Cf. *Federal Trade Comm'n v. Anheuser-Busch, Inc.*, 363 U. S. 536, 542.

The position of Borden and of the Court of Appeals is that the determination of like grade and quality, which is a threshold finding essential to the applicability of § 2 (a), may not be based solely on the physical properties of the products without regard to the brand names they bear and the relative public acceptance these brands enjoy—"consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional." 339 F. 2d, at 137. Here, because the milk bearing the Borden brand regularly sold at a higher price than did the milk with a buyer's label, the court considered the products to be "commercially" different and hence of different "grade" for the purposes of § 2 (a), even though they were physi-

lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said commodities are to such purchasers sold or delivered"

cally identical and of equal quality. Although a mere difference in brand would not in itself demonstrate a difference in grade, decided consumer preference for one brand over another, reflected in the willingness to pay a higher price for the well-known brand, was, in the view of the Court of Appeals, sufficient to differentiate chemically identical products and to place the price differential beyond the reach of § 2 (a).

We reject this construction of § 2 (a), as did both the examiner and the Commission in this case. The Commission's view is that labels do not differentiate products for the purpose of determining grade or quality, even though the one label may have more customer appeal and command a higher price in the marketplace from a substantial segment of the public. That this is the Commission's long-standing interpretation of the present Act, as well as of § 2 of the Clayton Act before its amendment by the Robinson-Patman Act,² may be gathered from the Commission's decisions dating back to 1936. *Whitaker Cable Corp.*, 51 F. T. C. 958 (1955); *Page Dairy Co.*, 50 F. T. C. 395 (1953); *United States Rubber Co.*, 46 F. T. C. 998 (1950); *United States Rubber Co.*, 28 F. T. C. 1489 (1939); *Hansen Inoculator Co.*, 26 F. T. C. 303 (1938); *Goodyear Tire & Rubber Co.*, 22 F. T. C. 232 (1936). These views of the agency are entitled to respect, *Federal Trade Comm'n v. Mandel Brothers, Inc.*, 359 U. S. 385, 391, and represent a more reasonable construction of the statute than that offered by the Court of Appeals.³

² A proviso to § 2 of the original Clayton Act excepted price discrimination "on account of differences in the grade, quality, or quantity of the commodity sold" 38 Stat. 730 (1914).

³ The commentators are somewhat divided on the dispute involved in this case. Supporting the Commission's view are the Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act, 39 (2d ed. 1959); Patman, The

Obviously there is nothing in the language of the statute indicating that grade, as distinguished from quality, is not to be determined by the characteristics of the product itself, but by consumer preferences, brand acceptability or what customers think of it and are willing to pay for it. Moreover, what legislative history there is concerning this question supports the Commission's construction of the statute rather than that of the Court of Appeals.

During the 1936 hearings on the proposed amendments to § 2 of the Clayton Act, the attention of the Congress was specifically called to the question of the applicability of § 2 to the practice of a manufacturer selling his product under his nationally advertised brand at a different price than he charged when the product was sold under a private label. Because it was feared that the Act would require the elimination of such price differentials, Hearings on H. R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 355, and because private brands "would thus be put out of business by the nationally advertised brands," it was suggested that the proposed § 2 (a) be amended so as to apply only to sales of commodities of "like grade, quality and *brand*." (Emphasis added.) *Id.*, at 421. There was strong objection to the amendment and it was not adopted by the Committee.⁴ The rejection of this

Robinson-Patman Act, 27 (1938); Edwards, *The Price Discrimination Law*, 31, 463-464 (1959); Seidman, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Laws and Techniques*, 409, 424-428 (1963). Contrary views are expressed by a minority of the Attorney General's Committee; in Rowe, *Price Discrimination under the Robinson-Patman Act*, 75 (1962); and in Cassidy and Grether, *The Proper Interpretation of "Like Grade and Quality" within the Meaning of Section 2 (a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

⁴ Mr. H. B. Teegarden, who was then counsel to the United States Wholesale Grocers Association, and who apparently played a large

amendment assumes particular significance since it was pointed out in the hearings that the legality of price differentials between proprietary and private brands was then pending before the Federal Trade Commission in *The Goodyear Tire & Rubber Co.*, 22 F. T. C. 232. By the time the Committee Report was written, the Commission had decided *Goodyear*. The report quoted from the decision and interpreted it as holding that *Goodyear* had violated the Act because "at no time did it offer to its own dealers prices on Goodyear brands of tires which were comparable to prices at which respondent was selling tires of equal or comparable quality to Sears, Roebuck & Co." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 4.

part in drafting the bill, Hearings on H. R. 4995 before the House Committee on the Judiciary, 75th Cong., 1st Sess., p. 9, supplemented his oral testimony with a letter addressed in part to the proposed amendment:

"To amend the bill by inserting 'and brands,' after the words 'commodities of like grade and quality,' as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A. & P. private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

"Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed."

During the debates on the bill, Representative Patman, one of the bill's sponsors, was asked about the private label issue. His brief response is wholly consistent with the Commission's interpretation of § 2 (a), 80 Cong. Rec. 8115:

"Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for particular chain stores. Is there anything in this bill calculated to remedy that situation?

"Mr. PATMAN. . . . I have not time to discuss that feature, but the bill will protect the independents in that way, because they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package, and this will remedy the situation to which the gentleman refers.

"Mr. TAYLOR of South Carolina. Irrespective of the brand.

"Mr. PATMAN. Yes; so long as it is the same quality. . . ."

The Commission's construction of the statute also appears to us to further the purpose and policy of the Robinson-Patman Act. Subject to specified exceptions and defenses, § 2 (a) proscribes unequal treatment of different customers in comparable transactions, but only if there is the requisite effect upon competition, actual or potential. But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact. We doubt that Congress intended to foreclose these inquiries in situations where a single seller markets the identical product under several different brands, whether his own, his customers or both. Such

transactions are too laden with potential discrimination and adverse competitive effect to be excluded from the reach of § 2 (a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal.⁵

If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as § 2 (a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition. Those who were offered only one of the two products would be barred from competing for those customers who want or might buy the other. The retailer who was permitted to buy and sell only the more expensive brand would have no chance to sell to those who always buy the cheaper product or to convince others, by experience or otherwise, of the fact which he and all other dealers already know—that the cheaper product is actually identical with that carrying the more expensive label.

The seller, to escape the Act, would have only to succeed in selling some unspecified amount of each product to some unspecified portion of his customers, however large or small the price differential might be. The seller's pricing and branding policy, by being successful, would apparently validate itself by creating a difference

⁵ Borden argues that it spends large sums to ensure the high quality of its Borden brand milk on customers' shelves, inferring that there really is a difference between its own milk and the milk sold under private labels, at least by the time it reaches the consumer. Of course, if Borden could prove this difference, it is unlikely that the case would be here. The findings are to the contrary in this case and we write on the premise that the two products are physically the same at the time of consumer purchase. Borden's extra expenses in connection with its own milk are more relevant to the cost justification issue than to the question we have before us.

in "grade" and thus taking itself beyond the purview of the Act."

Our holding neither ignores the economic realities of the marketplace nor denies that some labels will command a higher price than others, at least from some portion of the public. But it does mean that "the economic

"The market acceptability test would hardly stop with insulating from inquiry the price differential between proprietary and private label sales. That test would also immunize from the Act sales at different prices of the same product under two different producer-owned labels, the one being less advertised and having less market acceptability than the other. And if it is "consumer preferences," dissenting opinion, p. 1, which create the difference in grade or quality, why should not Borden be able to discriminate between two purchasers of private label milk, as long as one label commands a higher price from consumers than the other and hence is of a different grade and quality? In this context perhaps the market acceptability test would be refined to preclude this differential on the grounds that Borden's customer, as distinguished from the consumer, will not pay more than his competitor for private label milk and therefore the milk sold by Borden under one private brand is really of the same grade and quality as the milk sold under the other brand even though ultimate consumers will pay more for one than the other. Taking this approach, if Borden packed for one wholesale customer under two private labels, one having more consumer appeal than the other because of the customer's own advertising program. Borden must sell both brands at the same price it charges other private label customers because all such milk is of the same grade and quality. At the same time, the customer buying from Borden under two labels could himself sell one label at a reduced price without inquiry under § 2 (a) because the milk in one container is no longer of the same grade and quality as that in the other, although both the milk and the containers came from Borden. Such an approach would obviously focus not on consumer preference as determinative of grade and quality but on who spent the advertising money that created the preference—Borden's customer, not Borden, created the preference and hence the milk is of the same grade and quality in Borden's hands but not in its customer's. The dissent would exempt the effective advertiser from the Act. We think Congress intended to remit him to his defenses under the Act, including that of cost justification.

factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test." Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955). And it does mean that transactions like those involved in this case may be examined by the Commission under § 2 (a). The Commission will determine, subject to judicial review, whether the differential under attack is discriminatory within the meaning of the Act, whether competition may be injured, and whether the differential is cost justified or is defensible as a good-faith effort to meet the price of a competitor. "[T]angible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute." Report of The Attorney General's National Committee to Study the Antitrust Laws 159 (1955). This, we think, is precisely what Congress intended. The arguments for exempting private brand selling from § 2 (a) are, therefore, more appropriately addressed to the Congress than to this Court.⁷

The Court of Appeals suggested that the Commission's views of like grade and quality for the purposes of § 2 (a) cannot be squared with its rulings in cases where a seller presents the defense under § 2 (b)⁸ that he is in good

⁷ This is not, of course, a helpful suggestion to those who think the congressional remedy would be "very difficult if not impossible" and who thus prefer the more "reasonable approach" through the courts. See *Cassady and Grether, supra*, n. 3, at 277.

⁸ Section 2 (b), U. S. C. § 13 (b) (1964 ed.), provides as follows:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order

faith meeting the equally low price of a competitor.⁹ In those cases, it is said, the Commission has given full recognition to the significance of the higher prices commanded by the nationally advertised brand "in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it." 339 F. 2d., at 138.

The Commission, on the other hand, sees no inconsistency between its present decision and its § 2 (b) cases. In its view, the issue under § 2 (b) of whether a seller's lower price is a good-faith meeting of competition involves considerations different from those presented by the jurisdictional question of "like grade and quality" under § 2 (a).

We need not resolve these contrary positions. The issue we have here relates to § 2 (a), not to § 2 (b), and we think the Commission has resolved it correctly. The § 2 (b) cases are not now before us and we do not venture to decide them. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

terminating the discrimination: *Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.*"

⁹ The Court of Appeals relied upon *Callaway Mills Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963-1965, ¶16,800; *Anheuser-Busch, Inc.*, 54 F. T. C. 277 (1957); *Standard Oil Co.*, 49 F. T. C. 923 (1953); and *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948). Borden adds *Gerber Products Co. v. Beech-Nut Life Savers Co.*, 160 F. Supp. 916 (D. C. S. D. N. Y. 1958).

SUPREME COURT OF THE UNITED STATES

No. 106.—OCTOBER TERM, 1965.

Federal Trade Commission,	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
Petitioner,		
v.		
The Borden Company.		

[March 23, 1966.]

MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

I cannot agree that mere physical or chemical identity between premium and private label brands is, without more, a sufficient basis for a finding of "like grade and quality" within the meaning of § 2 (a) of the Robinson-Patman Act. The conclusion that a product that travels at a premium in the market place is of "like grade and quality" with products of inferior commercial value is not required by the language of the Robinson-Patman Act, by its logic, or by its legislative history.

It is undisputed that the physical attributes and chemical constituents of Borden's premium and private label brands of evaporated milk are identical. It is also undisputed that the premium and private label brands are not competitive at the same price, and that if the private label milk is to be sold at all, it must be sold at prices substantially below the price commanded by Borden's premium brand.¹ This simple market fact no more than reflects the obvious economic reality that consumer preferences can and do create significant commer-

¹ For example, one wholesaler, a witness for the Commission, stated:

"Private label merchandise is no good for nobody unless there is a price on it In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 or 25 cents a case under, it wouldn't sell, they couldn't give it away It has got to have \$1.50 or \$2 a case spread to make it interesting."

cial distinctions between otherwise similar products. By pursuing product comparison only so far as the result of laboratory analysis, the Court ignores a most relevant aspect of the inquiry into the question of "like grade and quality" under § 2 (a): Whether the products are different in the eyes of the consumer.²

There is nothing intrinsic to the concepts of grade and quality that requires exclusion of the commercial attributes of a product from their definition. The product purchased by a consumer includes not only the chemical components that any competent laboratory can itemize, but also a host of commercial intangibles that distinguish the product in the market place.³ The premium paid

² No suggestion is made that any of the private label brands involved in this case show significant commercial differentiation from one another. It is possible, of course, that by extensive promotion private label brands could achieve consumer acceptance equivalent to that of a premium brand. In that situation, the products would still be economically different under the market test of § 2 (a) elucidated in this opinion, since the relevant comparison would exclude promotional efforts by persons other than the producer of the premium brand. Thus, promotional activities by customers of Borden in the present case could not affect the determination of "like grade and quality" with regard to sales by Borden. Cf. Jordan, Robinson-Patman Act Aspects of Dual Distribution by Brand of Consumer Goods, 50 Cornell L. Q. 394, 406-407 (1965).

³ Cf. Chamberlain, *The Theory of Monopolistic Competition*, 56 (8th ed. 1962):

"A general class of products is differentiated if any significant basis exists for distinguishing the goods (or services) of one seller from those of another. Such a basis may be real or fancied, so long as it is of any importance whatever to buyers, and leads to a preference for one variety of the product over another. Where such differentiation exists, even though it be slight, buyers will be paired with sellers, not by chance and at random (as under pure competition), but according to their preferences.

"Differentiation may be based upon certain characteristics of the product itself, such as exclusive patented features; trade-marks; trade names; peculiarities of the package or container, if any; or singularity in quality, design, color, or style In so far as

for Borden brand milk reflects the consumer's awareness, promoted through advertising, that these commercial attributes are part and parcel of the premium product he is purchasing.⁴ The record in the present case indi-

these and other intangible factors vary from seller to seller, the 'product' in each case is different, for buyers take them into account, more or less, and may be regarded as purchasing them along with the commodity itself."

See also Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L. J. 1165, 1181 (1948):

"... The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer? Among the many illusions which advertising can fashion are those of lavishness, refinement, security, and romance. Suppose the monetary cost of compounding a perfume is trivial; of what moment is this if the ads promise, and the buyer believes, that romance, even seduction, will follow its use? . . . The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it."

⁴ For example, a grocer testified in the proceedings before the Commission that:

"People are going into a grocery store to pick up groceries, the majority of the people buy something that is advertised that they have known for years or heard of for years or see highly advertised. They know it is a good product, they know it is fancy merchandise or best quality."

Another grocer testified that:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them don't want anything except Pet."

"Q. They don't care what price—

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else."

"Q. You couldn't give her something else, could you?

"A. I doubt if I could."

cates that wholesale purchasers of Borden's private label brands continued to purchase the premium brand in undiminished quantities. The record also indicates that retail purchasers who bought the premium brand did so with the specific expectation of acquiring a product of premium quality.⁵ Contrary to the Court's suggestion, *ante*, p. 7, this consumer expectation cannot accurately be characterized as a misapprehension. Borden took extensive precautions to insure that a flawed product did not reach the consumer.⁶ None of these precautions was taken for the private brand milk packed by Borden.⁷ An important ingredient of the premium brand inheres in the consumer's belief, measured by past satisfaction and the market reputation established by Borden for its products, that tomorrow's can will contain the same

⁵ The results of a house-to-house survey conducted for Borden by National Analysts, Inc., indicated that consumers selected Borden's premium brand because of its superior quality. Comparable studies have reached a similar conclusion. Cf. "Mom Feels Quality, not Ad Cost, Makes Brand Item Costlier, 'Good House' Reports," *Advertising Age*, Dec. 7, 1964, p. 30.

⁶ Borden's Food Products Division maintained a staff of field representatives who inspected code-datings on cans of Borden brand milk in retail stores, in order to insure that older milk was sold first off the retailer's shelves. A witness for Borden testified that the principal dangers of long storage were discoloration of the milk, precipitation of calcium and other minerals, and separation and hardening of fat from the milk. As a further precaution against sales of defective milk, Borden dispatched its milk to wholesalers and retailers under a first-packed, first-shipped rotation plan that occasionally involved high-cost shipments from distant plants or warehouses. In addition, before shipment from a cold storage warehouse, Borden "tempered" its premium brand milk in order to prevent condensation on the cans, which might have resulted in rust to the cans and damage to the labels.

⁷ As counsel for the respondent candidly stated on oral argument to the Court, "The difference as to the private label brand packed by Borden is that, as to that product, the Borden Company washes its hands of it at the factory door."

premium product as that purchased today. To say, as the Court holds, that these and other intangibles, which comprise an important part of the commercial value of a product, are not sufficient to confer on Borden's premium brand a "grade" or "quality" different from that of private label brands is to ignore the obvious market acceptance of that difference. "[C]ommercially the 'advertised' brands had come in the minds of the public to mean a different grade of milk. The public may have been wrong; . . . it may have been right; . . . But right or wrong, that is what it believed, and its belief was the important thing." *Borden's Farm Products Co. v. Ten Eyck*, 11 F. Supp.⁴ 599, 600 (D. C. S. D. N. Y.) (opinion of L. Hand, J.).⁸

⁸ The Court's suggestion that the commentators are about equally divided upon the issue before us is somewhat misleading. It is true that the members of the Attorney General's National Committee to Study the Antitrust Laws, Report, pp. 156-159 (1955), were sharply divided as to whether significant consumer preferences should be taken into account under the "like grade and quality" test of § 2 (a). However, the very brief discussions of "like grade and quality" in Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* 39 (2d ed. 1959); Patman, *Complete Guide to the Robinson-Patman Act* 34-35 (1963); and Edwards, *The Price Discrimination Law* 31, 463-464 (1959), are not addressed to the relevance of significant consumer preferences, and the minimal discussion in Seidman is at best ambiguous, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Law and Techniques*, 409, 427-428 (1963). Those cursory treatments go no further than the view, with which I wholly agree, that no blanket exemption from § 2(a) is available for private label brands. But that view in no sense disposes of the concrete issue presented in this case. Commentators who have in fact focussed on the significance of consumer preferences uniformly favor inclusion of commercial acceptance in the test of "like grade and quality." Rowe, *Price Differentials and Product Differentiation: The Issues under the Robinson-Patman Act*, 66 *Yale L. J.* 1 (1956); Price Discrimination under the Robinson-Patman Act 62-76 (1962); Cassady and Grether, *The Proper Interpretation of "Like Grade and Quality" within the Meaning of § 2 (a) of the*

The spare legislative history of the Robinson-Patman Act is in no way inconsistent with a construction of § 2 (a) that includes market acceptance in the test of "like grade and quality." That history establishes no more than that mere differences in brand or design, unaccompanied by any genuine physical, chemical, or market distinction, are insufficient to negate a finding of "like grade and quality" under § 2 (a).⁹ Nothing that I have found in the legislative history speaks with precision to the sole issue before us here, the application of § 2 (a) to physically or chemically identical products that are in fact differentiated by substantial market factors.¹⁰

Robinson-Patman Act, 30 So. Calif. L. Rev. 241 (1957); Jordan, Robinson-Patman Act Aspects of Dual Distribution by Brand of Consumer Goods, 50 Cornell L. Q. 394 (1965).

⁹ The Court's suggestion, *ante*, p. 7, that a difference in label alone would exclude the reach of § 2 (a) if a market test were accepted for "like grade and quality" is no part of the present case and has never been offered as a serious interpretation of § 2 (a). Nor is there any issue raised here as to whether, under a market test of § 2 (a), a dubious pricing and branding policy adopted by a seller could "validate itself" and escape the Act by creating precarious distinctions in grade or quality. The price differential between Borden's premium and private label brands is concededly grounded upon a legitimate and stable market preference for the premium product. Moreover, the Commission's willingness to engage in the exhaustive analysis of injury to competition and cost justification under its "physical identity" test of § 2 (a) demonstrates that the Commission's resources would be more than adequate to determine the level of commercial preference sufficient to negate a finding of "like grade and quality" under a market test of § 2 (a).

¹⁰ Certain general language in the congressional reports may be taken, however, as supporting the interpretation that market factors are relevant in the construction of § 2 (a). The Report of the House Committee on the Judiciary stated that the general object of the bill was "to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller *not supported by sound economic differences in their business*

Neither the remarks of Representative Patman, *ante*, p. 6, nor the letter of Mr. Teegarden, *ante*, p. 4, n. 4, supports the Court's conclusion that Congress intended physical and chemical identity to be the sole touchstone of "like grade and quality." Aside from the obviously casual nature of Mr. Patman's reply to the question concerning the effect of the Act on private label brands,¹¹ his remarks go embarrassingly further than the circumspect reading sought to be given them by the Court. On its face, Mr. Patman's statement makes the blanket assertion that all products of the same quality must be sold at the same price. As thus stated, premium brands would have to be sold at the same price as private label brands, regardless of injury to competition, cost justification, or other available defenses under the Act. These undifferentiated remarks are therefore of little assistance in the determination of congressional intent. Far from supporting the Court's interpretation of § 2 (a), the final paragraph of the Teegarden letter suggests that Mr. Teegarden considered the bill to have no effect on a premium brand producer's decision to furnish private label brands to purchasers, so long as the private label brands were made available on the same terms to all purchasers. Mr. Teegarden's concern was with the prevention of discrimination between purchasers on the basis of artificial differences in brand.¹² That same concern, and no more,

positions. . . ." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 7. (Emphasis added.) The Report of the Senate Committee on the Judiciary is phrased in substantially the same language. S. R. Rep. No. 1502, 74th Cong., 2d Sess., p. 3.

¹¹ The remarks of Representative Patman were even more off-hand than the opinion of the Court indicates. Prefacing the portion of his remarks quoted by the Court, Mr. Patman said, "I only have a very short time, and I must finish my statement. I have not time to discuss that feature"

¹² The predominant concern of Congress in enacting the Robinson-Patman amendments to the Clayton Act was to abolish the notorious

is all that may legitimately be read into the rejection by Congress of the proposal to add "and brands" to the "like grade and quality" provision in the bill. By rejecting that proposal, it can be inferred only that Congress contemplated "no *blanket* exemption . . . for 'like' products which differed *only* in brand . . . , leaving open the application of the Act to differentiated products reflecting more than a nominal or superficial variation." Rowe, Price Discrimination under the Robinson-Patman Act, 65 (1962).

The references in the legislative hearings and the House Committee Report to the Commission's decision in *Goodyear Tire and Rubber Co.*, 22 F. T. C. 232, are equally inconclusive on the relevance of commercial acceptance to the determination of "like grade and quality." The striking aspect of that case is that Goodyear *conceded* that the differently branded tires involved in the proceeding were of like grade and quality, 22 F. T. C., at 290. Moreover, the tires purchased by Sears, Roebuck & Co. from Goodyear and sold under Sears' "All State" label were advertised by Sears as obtained from "the leading tire manufacturer" and "the world's foremost tire manufacturer," so that the market independence of Sears' private brand was compromised. *Id.*, at 295, 297.

The other administrative precedents relied on by the Court also fail to establish any consistently settled inter-

price discriminations that infected the post-Depression economy, especially the blanket immunity then available for quantity discounts under § 2 of the Clayton Act. An obvious commercial evil at the time was the widespread practice of offering private label brands to favored customers at rates substantially lower than the rates offered to competing purchasers. The abortive attempt, vigorously opposed by Mr. Teegarden, to introduce "and brands" into the "like grade and quality" provision would have left that evil completely unremedied. Cf. 80 Cong. Rec. 8234-8236 (rejection of amendments proposing the addition of "and design" and "purchased under like conditions" to the "like grade and quality" clause).

pretation by the Federal Trade Commission that physical identity is the sole touchstone of "like grade and quality." Those decisions singularly fail to focus on the significance of consumer preference as a relevant factor in the test of grade and quality.¹³ Moreover, the Commission has itself explicitly resorted to consumer preference or marketability to resolve the issue of "like grade and quality" in cases where minor physical variations accompany a difference in product brand.¹⁴ The

¹³ In *Hansen Inoculator Co.*, 26 F. T. C. 303, and the two *United States Rubber Co.* cases, 28 F. T. C. 1489; 46 F. T. C. 998, the finding of "like grade and quality" was either conceded by the respondent or not challenged. In addition, in *Hansen Inoculator*, there was significant evidence that the private label product was in fact trading on the reputation of the premium product. Further, in *Hansen Inoculator*, as in *Page Dairy Co.*, 50 F. T. C. 395, it is doubtful that even the labels on the two products were distinguishable. In *Whitaker Cable Corp.*, 51 F. T. C. 958, the resale prices of both products were identical, so that no commercial preference could have been proved in any event. Finally, in the first *U. S. Rubber* case and in *Whitaker Cable Corp.*, there was substantial discrimination by the seller between various purchasers of the private label brands. In setting aside the order of the Commission in the present case, the Court of Appeals for the Fifth Circuit emphasized that in none of these cases was there any showing that the brand names affected the market price of the products sold.

¹⁴ *Universal-Rundle Corp.*, CCH Trade Reg. Rep. Transfer Binder ¶ 16948, at pp. 22003-22005 (F. T. C. Dkt. 8070, June 12, 1964) (differences in plumbing fixtures); *Quaker Oats Co.*, CCH Trade Reg. Rep. Transfer Binder ¶ 17134, at p. 22215 (F. T. C. Dkt. 8112, Nov. 18, 1964) (differences in flour blends). Compare *E. Edelman & Co.*, 51 F. T. C. 978 (differences in automobile replacement parts); *Bruce's Juices, Inc. v. American Can Co.*, 87 F. Supp. 985, aff'd 187 F. 2d 919 (C. A. 5th Cir.) (differences in size of juice cans); *Champion Spark Plug Co.*, 50 F. T. C. 30 (differences in insulator and "ribs" of spark plugs). Cf. Comment, Like Grade and Quality: Emergence of the Commercial Standard, 26 Ohio State L. J. 294, 296-302 (1965). The Commission appears at one time to have held that brand identity may create a presumption of "like grade and quality," regardless of the existence of physical differences between

caprice of the Commission's present distinction thus invites Borden to incorporate slight tangible variations in its private label products, in order to bring itself within the Commission's current practice of considering market preferences in such cases.

The Commission's determination of "like grade and quality" under § 2 (a) in this case is seriously inconsistent with the position it has taken under § 2 (b) in cases where a seller has presented the defense that he is in good faith meeting the equally low price of a competitor. The Commission decisions are clear that the "meeting competition" defense is not available to a seller who reduces the price of his premium product to the level of nonpremium products sold by his competitors. The Commission decisions under § 2 (b) emphasize that market preference must be considered in determining whether a competitor is "meeting" rather than "beating" competition. In *Standard Oil Co.*, 49 F. T. C. 923, 952, the Commission put it baldly:

"[I]n the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor."¹⁵

the products. *General Foods Corp.*, 52 F. T. C. 798, 817; *Atalanta Trading Corp.*, 53 F. T. C. 565, 571. In setting aside the Commission's order in *Atalanta*, the Court of Appeals for the Second Circuit stated that "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded." *Atalanta Trading Corp. v. FTC*, 258 F. 2d 365, 371. In a footnote to that opinion, the Court of Appeals indicated that price differences were among the distinctions to be considered. *Id.*, at 371, n. 5. Cf. *Rowe*, Price Discrimination under the Robinson-Patman Act, 71-72 (1962).

¹⁵ See also *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 396-397: "To accept [the contrary] proposition would mean that any seller of a commodity which generally sells at a premium price may freely discriminate among its customers so long as it does not

Could the Commission under § 2 (b) now prevent Borden from reducing the price of its premium milk to the level of private-label milk? I can see no way that it could, short of maintaining a manifestly unstable equilibrium between § 2 (a) and § 2 (b). By adopting a keyhole approach to § 2 (a), the Court manages to escape resolution of the question, but it does so at the cost of casting grave doubt on what I had regarded as an important bulwark of § 2 (b) against a recognized competitive evil.

undercut the prices of competitors"; *Anheuser-Busch, Inc.*, 54 F. T. C. 277, 302: "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market The test in such a case is not necessarily a difference in quality, but the fact that the public is willing to buy the product at a higher price in a normal market"; *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.*, CCH Trade Reg. Rep. Transfer Binder ¶ 16,800, at p. 21755 (F. T. C. Dkt. 7634, Feb. 10, 1964): "Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of . . . intense public demand, normally commands a price higher than that usually received by sellers of competitive goods"; *Standard Brands, Inc.*, 46 F. T. C. 1485, 1495; *Gerber Products Co. v. Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 920, 921-922 (D. C. S. D. N. Y.). Cf. *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 237 (C. A. 2d Cir.). In the present case, the Court of Appeals for the Fifth Circuit specifically refused to "approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case." 339 F. 2d 133, at 139. See the comment of Commissioner Mason: "First the Commission finds you guilty of price discrimination by disregarding popularity of goods, and finds the grade and quality of the commodities in question are the same; then they knock out your meeting of competition defense because your goods are more popular than others, even if the commodities in question are of like grade and quality." Discriminate in Price between Different Purchasers of Commodities of Like Grade, Quality and Popularity, Proc. Am. Bar Assn. Section of Antitrust Law 82, 91-92 (Aug. 1953). Cf. *Eine Kleine Juristische Schlummergeschichte*, 79 Harv. L. Rev. 921, 928-929 (1966).

The Court gives no substantial economic justification for its construction of § 2 (a).¹⁶ The principal rationale of the restriction of that section to commodities of "like grade and quality" is simply that it is not feasible to measure discrimination and injury to competition where different products are involved. That rationale is as valid for economic as for physical variation between products. Once a substantial economic difference between products is found, therefore, the inquiry of the Commission should be ended, just as it is ended when a substantial physical difference is found.

In spite of the assertion of the Attorney General's Report quoted by the Court, it is unlikely that economic differences between premium and private label brands can realistically be taken into account by the Commission under the "injury to competition" and "cost justification" provisions of § 2 (a).¹⁷ Even if relevant cost

¹⁶ The Court's brief discussion of the adverse economic effect of the Fifth Circuit's ruling is concerned primarily with the supposed injury to secondary line competition. The present proceeding arose as the direct result of the primary line injury caused to Midwest packers of private label evaporated milk when Borden expanded its plants in Tennessee and South Carolina to include private label operation, but the opinion of the Court nowhere discusses such competition.

¹⁷ It is not clear that the "injury to competition" and "cost justification" issues will be reached on the remand. As the opinion of the Court suggests, *ante*, p. 9, the existence of price discrimination is an issue that remains open in the Court of Appeals. If Borden is able to demonstrate that the price differential between its premium and private label brands is not a price discrimination, the inquiry by the Commission is at an end, and no issue of injury to competition or cost justification under § 2 (a) is reached. Nothing in *FTC v. Anheuser-Busch, Inc.*, 363 U. S. 536, a case concerned only with territorial price discrimination, requires an equation in all circumstances between a price differential and price discrimination. So long as Borden makes private label brands available to all customers of its premium milk, it is unlikely that price discrimi-

data can be agreed upon, the cost ratio between Borden's premium and private label products is hardly the most significant factor in Borden's pricing decision and market return on those products. Moreover, even if price discrimination is found here, its effect on competition may prove even more difficult to determine than in more conventional cases of price discrimination under § 2 (a). Cf. *FTC v. Morton Salt Co.*, 334 U. S. 37; *United Biscuit Co. v. FTC*, 350 F. 2d 615 (C. A. 7th Cir.).

The threat presented to primary line competition by Borden's distribution of premium and private label brands is unclear. No allegation was made that Borden has used its dominant position in the premium brand market to subsidize predatory price-cutting campaigns in the private label market. Borden packs its private label brands for national distribution, so that this case is essentially different from those in which geographical price discriminations are involved. Further, Borden's private label brands are aimed in part at a different, more price-conscious class of consumer. Because relevant economic factors differ in the premium and private label markets, conventional notions of price discrimination under the Robinson-Patman Act may not be applicable.¹⁸ More important, Borden's extensive distribution of its private label brands has introduced significant low-cost competition for Borden's own premium product. Thus, the large retail chains and cooperative buyer organizations that are Borden's chief private label customers represent a significant source of countervailing power to the

nation within the meaning of § 2 (a) can be made out. *Boss Mfg. Co. v. Payne Glove Co.*, 71 F. 2d 768, 770-771 (C. A. 8th Cir.); Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* 21 (2d ed. 1959); Rowe, *Price Discrimination under the Robinson-Patman Act*, *supra*, at 97-99.

¹⁸ Cf. Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. Pa. L. Rev. 222, 228-230 (1955).

oligopoly pattern of evaporated milk production. The rise of this sort of competition is well known in other parts of the food industry.¹⁹ In these circumstances, the anticompetitive leverage against primary line competition available to Borden through its private label production is sharply curtailed. There is, therefore, no real resemblance in this case to the serious discriminatory practices that the Robinson-Patman Act was enacted to prevent.

The potential economic impact of Borden's distribution of private label brands on secondary line competition is equally ambiguous. It is true that a market test of "like grade and quality" would enable Borden, so far as § 2 (a) is concerned, to make private label brands selectively available to customers of its premium brand. Not all wholesale and retail dealers who carry Borden's premium brand would be able, as of right, to take advantage of Borden's private label production. But the Commission could still apply § 2 (a) with full force against discriminations between private label customers. And the Government could still invoke § 2 of the Sherman Act or § 5 of the Federal Trade Commission Act to deal with other forms of price discrimination by Borden against its customers or competitors.

Under the Court's view of § 2 (a), Borden must now make private label milk available to all customers of its premium brand.²⁰ But that interpretation of § 2 (a) is

¹⁹ See Staff Report of the Federal Trade Commission, Economic Inquiry into Food Marketing, Part II, The Frozen Fruit, Juice and Vegetable Industry (1962); Jordan, *supra*, at 413-417.

²⁰ The Commission concedes that there is no evidence in the record that Borden refused to sell private label milk to any customer who specifically requested it. Borden's private label business in the period covered by these proceedings was substantial. In 1957, Borden sold 4,300,000 cases of its premium brand evaporated milk and 1,100,000 cases of private label milk (government and export

hardly calculated to speed private label brands to the shelves of retailers. To avoid supplying a private label brand to a premium brand customer, Borden need only forego further sales of its premium brand to that customer. It is, therefore, not unlikely that the Court's decision will foster a discrimination greater than that which it purports to eliminate, since retailers previously able to obtain the premium Borden brand but not a private label brand, may now find their access to the premium brand foreclosed as well.

In *Automatic Canteen Co. v. FTC*, 346 U. S. 61, 63, this Court cautioned against construction of the Robinson-Patman Act in a manner that might "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." Today that warning goes unheeded. In the guise of protecting producers and purchasers from discriminatory price competition, the Court ignores legitimate market preferences and endows the Federal Trade Commission with authority to disrupt price relationships between products whose identity has been measured in the laboratory but rejected in the market place. I do not believe that any such power was conferred upon the Commission by Congress, and I would, therefore, affirm the judgment of the Court of Appeals.

business excluded); net sales of these products were \$27,600,000 and \$5,700,000, respectively. A major source of Borden's private label business was provided by cooperative associations of wholesalers and retailers, so that, in fact, there was an opportunity for large numbers of small retailers to compete in the sale of private label brands of evaporated milk obtained from Borden. One such group, whose purchases accounted for 11% of Borden's private label volume in 1957, had more than 1,000 retailer members. Not all retailers, however, availed themselves of the opportunity to market private label milk. One wholesaler testified that, a year after his private label brand had been offered to the 600 retail grocers in his service area, only 50 of the grocers had become regular customers.